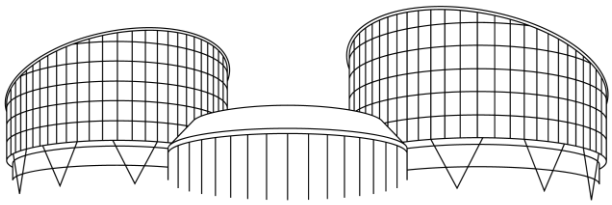

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF I.K. v. AUSTRIA

(Application no. 2964/12)

JUDGMENT

STRASBOURG

28 March 2013

FINAL

26/06/2013

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

In the case of I.K. v. Austria,

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

Isabelle Berro-Lefèvre, *President,*
Elisabeth Steiner,
Khanlar Hajiyev,
Linos-Alexandre Sicilianos,
Erik Møse,
Ksenija Turković,
Dmitry Dedov, *judges,*

and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 5 March 2013,

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

PROCEDURE

1. The case originated in an application (no. 2964/12) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr I.K. ("the applicant"), on 13 January 2012. The President of the Section acceded to the applicant's request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant was represented by Ms D. Einwallner, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry of European and International Affairs.

3. The applicant alleged that removing him to Russia would subject him to ill-treatment within the meaning of Article 3 of the Convention, and that it would also separate him from his wife and children, in violation of Article 8 of the Convention.

4. On 17 January 2012 the Court decided to apply Rule 39 of the Rules of Court, indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings not to expel the applicant until further notice.

5. On 17 January 2012 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

6. On 26 January 2012 the Russian Government was invited to inform the Court whether they wished to exercise their right under Article 36 § 1 of the Convention to intervene in the proceedings. On 17 April 2012 the

Russian Government informed the Court that they would not exercise their right to intervene in the proceedings.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant, a Russian national of Chechen origin, was born in 1976 and lives in Vienna.

A. The applicant's asylum proceedings in Austria

8. The applicant left Chechnya for Kyrgyzstan and Poland in April 2004, with his mother. They arrived in Austria in November 2004 and lodged an asylum request there.

9. He claimed in his asylum proceedings that in 2001 his father had been shot before his eyes. The applicant's father had worked in the security services of former President Maskhadov, a separatist leader, which was why he and his family had been persecuted. Furthermore, the applicant had been arrested four times and only released after the payment of a ransom. The applicant stated that he had been ill-treated during those arrests and also that in 2004 Russian soldiers had brutally beaten him in the course of an identity check.

10. On 5 March 2007 the Federal Asylum Office (*Bundesasylamt*) dismissed the applicant's asylum request as unfounded. It found the applicant's story contradictory and unconvincing and also found that he had failed to substantiate the existence of any real risk to himself.

11. It seems that the applicant's mother's asylum request was also dismissed, for the same reasons.

12. The applicant and his mother appealed. However, after an oral appeal hearing, the applicant withdrew his appeal on 28 April 2009 due to allegedly wrong legal advice he received at the time.

13. On 12 May 2009 the Asylum Court (*Asylgerichtshof*) allowed the applicant's mother's appeal and granted her the status of a recognised refugee. As regards her flight story it found as follows:

> "The following has been established concerning the appellant and her reasons for fleeing:
>
> The appellant claims to be a Russian Federation national of Chechen ethnic origin and, prior to fleeing, lived in the village of Kurchaloy in Chechnya.
>
> It is credible that in the event of her return to her country of origin, the appellant would be under threat from State authorities or third parties on account of her membership of a particular social group. The appellant alleged that she was under

threat from Russian and Chechen security forces because of her husband's previous activities.

It has been found plausible that the appellant's husband was an officer for a Chechen security agency and was murdered by the security forces on 5 November 2001 in the village of Kurchaloy.

The findings as to the appellant and her reasons for fleeing result from the descriptions given by the persons examined at the hearing, which – in this respect – are consistent and credible. The appellant was able to give a description of her husband's murder that was clear and consistent with her previous statements, thereby conveying the impression of having actually experienced what she was talking about. The witness C.S. gave a convincing statement confirming that the appellant's husband worked for a Chechen security agency."

14. After referring to a number of general country reports on Russia and the north Caucasus region, the Asylum Court continued its legal assessment of the facts of the applicant's mother's case, as follows:

"Regard being had to the findings concerning the situation of Chechens in the Russian Federation, the appellant faces an objective risk of persecution in view of the facts established as to her reasons for seeking asylum. The appellant's husband was murdered in his homeland because of his work for a Chechen security agency. Accordingly, the appellant is already known to the Russian and pro-Russian authorities and has come specifically to their attention. This means that she is in particular danger of being arrested by the security forces in Chechnya, and in such an eventuality there is a significant probability that she would be at risk of suffering human rights violations. Moreover, in view of the situation in Chechnya and the fact that the appellant is known by name to the authorities, it cannot be assumed with sufficient certainty that she would not be exposed in other parts of the Russian Federation, for example, to attacks of any kind warranting asylum or that she could expect effective protection from the authorities against such attacks. Accordingly, the appellant – who, moreover, is suffering from post-traumatic stress disorder – has no reasonable internal flight alternatives available either."

15. On 4 June 2009 the applicant lodged a new asylum request. In interviews conducted in the course of those asylum proceedings, the applicant repeated the initial reasons he had given for leaving Chechnya, and informed the authorities that he had married a Russian national in March 2008 and that the couple had two children together, born in 2009 and 2010. When asked if his mother was alive, the applicant stated his mother's name and that she lived with him and his family in the same apartment. He explained that his family therefore all lived in Austria and that he would like to be with them and work there. When the applicant was notified that he had not lodged any new facts, he stated that he knew that, but that he did not have any new facts to offer or information in that regard.

16. The applicant confirmed that he still had relatives and friends in Chechnya and that a cousin of his had returned to Chechnya from Austria in 2010. A brother of his father lived in Ingushetia. Referring to his criminal convictions (see paragraphs 25 and 26 below) the applicant stated that he regretted his mistakes. Finally, in the interview on 5 January 2011 the

applicant stated, when asked whether he was taking any medication at the moment, that he was not.

17. On 11 January 2011 the Federal Asylum Office rejected the applicant's subsequent asylum request as *res judicata*. It established the applicant's identity and reiterated the proceedings in his respect. In the context of the applicant's private and family life in Austria, the Federal Asylum Office referred to his mother, wife and children, confirming that they were all recognised refugees in Austria and citing their file numbers. Indicating various country reports, *inter alia* by the German Federal Foreign Office of 2010, the United States Department of State Report on Russia of 2010, the Office for Foreigners (Poland), CEDOCA, the Documentation and Research Centre of the Office of the Commissioner General for Refugees and Stateless Persons (Belgium) and the country of origin information available to the Federal Asylum Office, it noted that the general security situation and the protection of human rights in the north Caucasus region had deteriorated again in 2008 and 2009. In some cases of individuals who had decided to follow rebel groups, the authorities were reported to have retaliated by burning down the houses of their relatives. The numbers of abductions had also increased again, to seventy-four cases in the first half of 2009. The Federal Asylum Office further referred to the amnesty regime introduced in 2006 and the surge of house burnings in 2008 and 2009.

18. In conclusion and as regards the applicant's submissions, the Federal Asylum Office stated that the applicant's initial reasons for leaving had already been considered unconvincing in the first proceedings and that the applicant had not forwarded any new relevant information in the new proceedings.

19. An appeal by the applicant against this decision was granted suspensive effect. In his appeal the applicant claimed deficiencies of the proceedings and a wrong legal assessment of the established facts by the Federal Asylum Office. He claimed that, because he was still at real risk of persecution if he returned to Chechnya and because of the deterioration of the security situation there, his subsequent asylum request could not be considered a *res judicata*.

20. On 1 April 2011 the Asylum Court dismissed the appeal as unfounded. In the summary of the facts of the case, it referred to the applicant's mother, wife and children, while again citing the file numbers of their asylum proceedings.

21. As regards the nature of a *res judicata*, it reiterated that a new decision on the merits of an application could only be based upon a change of circumstances which was significant enough to allow the conclusion, either alone or in combination with other facts, that those reasons for which the former application had been dismissed were to be evaluated differently in the present proceedings. Referring to long-standing administrative jurisprudence, it further stated that the credibility of the alleged new facts

had to be evaluated anew in the context of all former investigation results in the event that those alleged new facts could *prima facie* lead to a different outcome of the proceedings.

22. The Asylum Court went on and established that the applicant's reasons for leaving Chechnya presented in the subsequent proceedings had already been deemed unconvincing by the previous final decision. It therefore confirmed that the applicant had not presented any relevant new information with regard to his asylum request. Furthermore, the applicant was not suffering from any severe psychological or physical illness, and still had friends and family living in Chechnya.

23. With regard to the applicant's right to respect for his family life, it considered that the applicant's removal to Russia would constitute an interference with his family life, since the applicant lived with his mother, wife and two minor children, who were all recognised refugees, but found that the applicant had never had secure residence status in Austria, even when he had married, and that he had not shown that he had substantially integrated into Austrian society. On the other hand, the applicant had been convicted four times of criminal offences such as theft and aggravated bodily harm, and an exclusion order in respect of residence until September 2013 had been issued in 2007, which had led to the conclusion that the public interest in the applicant's removal outweighed his private interest in respect of his family life in Austria.

24. On 10 June 2011 the Constitutional Court (*Verfassungsgerichtshof*) dismissed the applicant's application for legal aid to enable him to lodge a complaint. That decision was served on the applicant's counsel on 18 July 2011.

B. The applicant's criminal convictions

25. The applicant was convicted of theft and attempted theft on 29 November 2005 and 29 March 2006, fined 100 euros (EUR) and sentenced to one month's imprisonment, suspended with probation. On 22 May 2007 the Krems Regional Court (*Landesgericht Krems*) convicted the applicant of trafficking under the 2005 Aliens Police Act (*Fremden-polizeigesetz*) and of aggravated bodily harm, and sentenced him to ten months' imprisonment. Finally, on 6 February 2008, the Vienna Regional Court (*Landesgericht Wien*) again convicted the applicant of aggravated bodily harm and sentenced him to an additional two months' imprisonment.

26. On 27 June 2007 the Vienna Federal Police Authority (*Bundes-polizeidirektion*) issued a banning order (*Rückkehrverbot*) against the applicant until 27 September 2013.

C. The application of Rule 39 of the Rules of Court

27. On 2 August 2011 the Vienna Federal Police Authority summoned the applicant to arrange for his removal. It seems that a travel certificate had been requested.

28. On 17 January 2012 the Court applied an interim measure under Rule 39 and requested the Austrian Government to stay the applicant's removal to Russia until further notice.

D. Medical evidence submitted by the applicant

29. From 28 June to 6 July 2011 the applicant was treated as an inpatient at Otto Wagner Hospital in Vienna for a depressive episode. The discharge letter of 7 July 2011 stated that he had been admitted suffering from a severe depressive episode and suicidal thoughts, so that his medication could be adjusted. He was prescribed Cipralex and Mirtabene when he was released. For his health to continue to improve it was recommended that he should continue to have his family's support and that removal to Russia would be irresponsible from a psychiatric point of view.

30. On 27 June 2011 and after one consultation, Vienna General Hospital confirmed that the applicant was suffering from post-traumatic stress disorder and a medium-level depressive episode and recommended pharmacological and psychotherapeutical treatment. It also advised against removing him to Russia.

31. A diagnostic letter from Wilhelminen Hospital in Vienna dated 12 May 2010 stated that a CT scan had shown a facial bone conversion in his right ventral maxilla that would correspond with the applicant's statement that he had been physically abused in Chechnya.

II. RELEVANT LAW AND PRACTICE

A. Domestic law and practice

Res judicata in the domestic legal system as regards asylum proceedings

32. Section 68 § 1 of the Code of General Administrative Procedure (*Allgemeines Verwaltungsverfahrensgesetz*) provided that submissions from individuals who request modification of a ruling which is not, or is no longer, subject to appeal, shall be rejected as *res judicata*. In this context the 2005 Asylum Act (*Asylgesetz 2005*) included in its section 75 § 4 a reference to section 68 of the Code of General Administrative Procedure that

"Decisions rejecting or dismissing a request under the [former versions of the] Asylum Act ... shall constitute *res judicata* in proceedings under this Federal Act concerning the same facts."

33. The Austrian Administrative Court has observed in its jurisprudence as follows (see judgment of the Administrative Court of 21 November 2002, no. 2002/20/0315):

"An alleged change in circumstances may entitle and require the authority to give a fresh decision on the merits – once it has carried out any necessary investigations of its own motion under section 28 of the 1997 Asylum Act – only where such a change, by itself or in combination with other facts, would be of legal relevance to the question of asylum; a different legal assessment of the request must not be prima facie inconceivable. Furthermore, the alleged change in circumstances must have at least a credible basis which is relevant to the question of asylum and to which to the above-mentioned prospect of a positive decision can be linked. To that end, as soon as it begins to examine the admissibility of the (fresh) asylum request, the authority must address the credibility of the asylum-seeker's allegations and, where appropriate, the evidential value of any certificates. Should the authority's investigations conclude that, contrary to the party's allegations, a change in circumstances which is prima facie capable of giving rise to a different assessment has not in fact occurred, the asylum request must be rejected in accordance with section 68(1) of the Code of General Administrative Procedure (see decision of 19 July 2001, no. 99/20/0418, with further references; see also the case-law recapitulated in Walter/Thienel, *Verwaltungs-verfahrensgesetze I*, 2nd ed., notes 73 et seq. on section 68 of the Code of General Administrative Procedure)."

B. Relevant international information

1. Summary of country information available at the time of the domestic proceedings

34. This section gives a short overview of selected reports from various easily accessible sources on the security and human rights situation in Chechnya available at the time of the applicant's subsequent asylum proceedings in Austria.

(a) Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to the Russian Federation (Chechen Republic and the Republic of Ingushetia) from 2 to 11 September 2009, dated 24 November 2009

35. The Commissioner stated that the north Caucasus has been a region of major interest and concern from the very beginnings of the office of the Commissioner of Human Rights in 1999.

36. The Commissioner noted that the lifting of the decade-long counterterrorist operation in the Chechen Republic had not been accompanied by a diminution in the activities of illegal armed groups. Federal and Chechen authorities had carried out over 100 special operations in the first half of 2009 (see paragraphs 21-23). The report further noted an

increase in the number of abductions and disappearances in Chechnya since the end of 2008. In some cases, the involvement of law-enforcement officials had been alleged (see paragraph 30). Finally, the lack of effective investigations of repeated human rights violations, the alleged involvement of law-enforcement officials in crimes, and the deficiencies of the judiciary, were concerns which had been raised by both the current Commissioner and his predecessor (see paragraph 39).

37. He concluded the report with regret, in view of the fact that stability in the north Caucasus region had yet to be achieved. Increased activity by illegal armed groups, the lack of effective investigations of disappearances and killings, and murders of human rights activists were of particular concern. Patterns of impunity persisted, even though there were indications of serious efforts to reinforce the rule of law. The difficult economic situation was one of the destabilising factors, and the need for economic development and further social reconstruction was evident (see paragraph 64).

(b) US State Department Human Rights Report on Russia 2009, dated 11 March 2010

38. This report described the north Caucasus region of Russia as remaining an area of particular concern. The government's poor human rights record in the north Caucasus worsened as the government fought insurgents, Islamist militants, and criminal forces. Local government and insurgent forces reportedly engaged in killing, torture, abuse, violence, politically motivated abductions, and other brutal or humiliating treatment, often with impunity. In Chechnya, Ingushetia and Dagestan, the number of extrajudicial killings and disappearances increased markedly, as did the number of attacks on law-enforcement personnel. Authorities in the north Caucasus appeared to be acting outside federal government control. Although the Chechen government announced a formal end to counterterrorist operations, there was an increase in violence during the summer, which continued through the remainder of the year. Federal and local security forces in Chechnya, as well as the private militia of Chechen president Ramzan Kadyrov, allegedly targeted families of suspected insurgents for reprisals and committed other abuses. There were also reports of rebel involvement in bombing civilian targets and of politically motivated disappearances in the region. Some rebels were allegedly involved in kidnapping for ransom. According to the Internet-based news agency Caucasian Knot, 342 members of law-enforcement agencies lost their lives and 680 were injured during the year in actions involving insurgents. Thousands of internally displaced persons were living in temporary centres in the region: the centres failed to meet international standards.

39. Under the heading "Use of Excessive Force and Other Abuses in Internal Conflicts", it was noted that during the year complex and inter-connected insurgencies caused continuing instability in the north Caucasus, with a marked upsurge in incidents committed by government and insurgent forces during the year. Overall, there were increases in disappearances, killings, and other abuses. There were reports that federal and local security forces seeking to quell the insurgencies were continuing to use excessive force and to engage in human rights abuses, including torture, summary executions, disappearances, and arbitrary detentions. Authorities in the north Caucasus were reportedly acting with impunity, and some observers alleged that the federal government had ceded *de facto* control of the region to local authorities. Rebels were also continuing to commit human rights abuses, including major acts of terrorism and summary executions.

40. As regards abductions, the report stated that Government personnel, rebels and criminal elements were continuing to engage in abductions in the north Caucasus. Officials and observers disagreed on the numbers involved. Human rights groups believed that the numbers of abductions were under-reported, due to the reluctance of detainees' relatives to complain to authorities for fear of reprisals. The Memorial NGO reported that during the year there were ninety kidnappings in Chechnya, while the MAShR NGO reported 234 disappearances in Ingushetia and thirty-one disappearances in Dagestan. It stated that there was no accountability for government forces involved in abductions. There were continued reports that abductions were followed by beatings or torture to extract confessions, and that abductions were conducted for political reasons. Criminal groups in the region, possibly with links to rebel forces, frequently resorted to kidnapping.

41. Finally, under the heading "Physical Abuse, Punishment and Torture", it could be read that armed forces and police units were reported to have frequently abused and tortured people in holding facilities where federal authorities took them to separate fighters and those who were suspected of aiding rebels from ordinary civilians.

(c) Amnesty International Report 2009 on Russia, dated 28 May 2009

42. The Amnesty International report stated that there were continuing reports of human rights violations, including arbitrary detention, torture and ill-treatment, and extrajudicial executions, by law-enforcement officials in Chechnya, Dagestan and Ingushetia. There was also an ongoing concern that investigations of these violations were not effective, resulting in widespread impunity.

(d) Schweizerische Flüchtlingshilfe (Swiss Refugee Council): North Caucasus: Security and Human Rights, dated 25 November 2009

43. The present report was an update to the organisation's report of 2007 and used sources from human rights organisations, such as the Human

Rights Centre of the Russian NGO Memorial, Amnesty International and Human Rights Watch, as well as the results of a meeting with six human-rights activists from the north Caucasus and a Chechen human-rights specialist. The report stated that the security situation in the whole north Caucasus region had deteriorated. In summer 2009 the number of those killed in "special operations" conducted by security services or in terrorist attacks had doubled. The Centre for Strategic and International Studies CSIS reported 442 deaths between May and August 2009 in the whole region (see page 4).

44. The report cited arbitrary arrests, secretive detention, torture and ill-treatment, disappearances and abductions, death in detention and extrajudicial executions, the burning of houses, displacements and forced recruitments as the most severe violations of human rights (see page 10 et seq.).

45. Members of non-governmental organisations, journalists, members of the political opposition, victims and their relatives, witnesses and lawyers, relatives of armed rebels or of members of the security services, young religious men and internally displaced persons were considered to be those most at risk of being subjected to serious human rights violations in the region. Furthermore, returnees from abroad were, according to a member of Memorial, at particular risk. They were under suspicion of having fled because of their membership of the armed opposition and of having returned with considerable financial resources.

46. In this context the report referred to a letter from the Austrian office of the United Nations High Commissioner for Refugees ("the UNHCR") of 7 April 2009 that stated, as regards asylum requests by refugees from Chechnya, that while the military and security situation in Chechnya had significantly improved, there were still instances of human-rights violations that could lead to well-founded asylum requests by Chechens. Such requests should therefore be fairly and efficiently examined by the authorities. As regards those who had already been recognised as refugees, the UNHCR recommended that they should in any event be able to keep their legal status. Any return to the Russian Federation should be done on an exclusively voluntary basis (see page 20, including a link to the cited document by the UNHCR office in Austria).

2. More recent country information

47. The Court summarised newer relevant country reports only recently in its judgement *Bajsultanov v. Austria* (see *Bajsultanov v. Austria*, no. 54131/10, §§ 38 et seq, 12 June 2012). Where available, updated information once more depicts the following situation:

(a) US State Department Human Rights Report on Russia 2011, dated 24 May 2012

48. The report for 2011 identified as one of the most significant problems during that year in its executive summary that the rule of law was particularly deficient in the north Caucasus, where the conflict between the government and insurgents, Islamist militants and criminal forces had led to numerous human rights abuses by security forces and insurgents, who were reportedly engaging in killing, torture, physical abuse and politically motivated abductions. In addition, the government of Ramzan Kadyrov in Chechnya was continuing to violate fundamental freedoms, engage in collective retribution against families of suspected militants, and foster an overall atmosphere of fear and intimidation.

49. More precisely, the report stated under the heading "Use of Excessive Force and Other Abuses in Internal Conflicts" that violence was continuing in the north Caucasus republics, driven by separatism, inter-ethnic conflict, jihadist movements, vendettas, criminality and excesses by security forces. Dagestan continued to be the most violent area in the north Caucasus; Kabardino-Balkaria also saw an increase in violence compared with the previous year, while violence continued to decrease in Chechnya, Ingushetia and North Ossetia.

50. It further noted that government personnel, rebels and criminal elements were continuing to engage in abductions in the north Caucasus. The head of the prosecutor general's office for the north Caucasus stated in June that more than 2,100 disappearances remained unsolved in the north Caucasus republics. Security forces in Chechnya, Dagestan and Ingushetia frequently abducted or detained individuals for several days without immediate explanation or charge. Human rights groups believed the number of abductions was under-reported because victims' relatives were reluctant to complain to authorities due to fear of reprisals. Generally, there was no accountability for government security personnel involved in abductions. Memorial reported at the beginning of the year that at least eight Russian citizens from the north Caucasus had been kidnapped since September 2010. According to Caucasian Knot, in the first eleven months of 2011 there were sixty-four disappearances, twenty-eight of which took place in Dagestan, twenty in Chechnya, thirteen in Ingushetia and three in Kabardino-Balkaria. Human rights groups alleged that security forces under the command of Kadyrov played a significant role in abductions, either on their own initiative or in joint operations with federal forces, including abductions of family members of rebel commanders and fighters.

51. Under the heading "Physical abuse, punishment and torture" the paper mentioned that armed forces and police units in the region reportedly abused and tortured both rebels and civilians in holding facilities. The burning of homes of suspected rebels, a mechanism of collective punishment in use since 2008, was reportedly continuing.

(b) Amnesty International Annual Report 2012 – Russian Federation (undated)

52. As regards the security situation in the north Caucasus, the report found that it remained volatile, and serious human rights abuses were being committed by both armed groups and security officials. The rapid post-conflict reconstruction of Chechnya continued with high levels of federal funding, though unemployment remained a problem. Activity by armed groups declined compared to other regions in the north Caucasus. Law-enforcement operations continued to give rise to reports of serious human rights violations. In a letter to the human rights NGO The Interregional Committee Against Torture, a senior Chechen prosecutor acknowledged that investigations of enforced disappearances in Chechnya were ineffective.

(c) Human Rights Watch, World Report Chapter: Russia 2012, dated January 2012

53. As regards the north Caucasus the report stated that according to official statements, the number of insurgent attacks in the north Caucasus doubled in 2010 compared to 2009. In 2011 the Islamist insurgency remained on the rise, especially in the Republic of Dagestan. The authorities' use of torture, abduction-style detention, enforced disappearances and extrajudicial killings in the course of their counter-insurgency campaign, coupled with impunity for these abuses, had antagonised the population of the north Caucasus.

54. Chechen law-enforcement and security agencies under Ramzan Kadyrov's *de facto* control were continuing to resort to collective punishment of relatives and suspected supporters of alleged insurgents. Memorial documented eleven abductions of local residents by security forces between January and September 2011. Five of those abducted subsequently "disappeared".

55. Increasingly, victims refused to speak about violations due to fear of official retribution. In a letter to a Russian NGO in March 2011 federal authorities stated that police in the Chechen Republic sabotaged investigations of abductions of local residents, and sometimes covered up for perpetrators. The letter marked the first public acknowledgment of the importance of federal investigative authorities in investigating abuses in Chechnya.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION

56. The applicant complained that removing him to Russia would violate Articles 2 and 3 of the Convention.

57. The Court decides to examine the applicant's complaint under Article 3 of the Convention alone, which provides as follows:

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

A. Admissibility

58. The Government submitted that the complaint was inadmissible for non-exhaustion of domestic remedies, since the applicant had failed to inform the domestic authorities of his deteriorating psychological health and to provide the authorities with the medical information he had submitted to the Court.

59. The applicant contested that view, referring to the fact that the documents regarding the applicant's mental health provided to the Court all originated from a time after the asylum proceedings in Austria had ended. In fact his health had deteriorated only after the dismissal of his asylum request. Furthermore, the Government's argument regarding the admissibility of the complaint ignored the fact that the applicant also, and most importantly, feared that he would be subjected to ill-treatment and persecution if he returned to Russia.

60. Firstly, the Court notes that the objection clearly can only refer to one of the two complaints lodged by the applicant under Article 3 of the Convention, namely the complaint in relation to his mental health. The Court is of the opinion that the objection therefore does not refer to the complaint concerning a perceived risk of persecution of the applicant if he were returned to Russia (see paragraphs 64 and 65 below).

61. Secondly, the Court confirms that the material provided by the applicant to the Court concerning his psychological health dates from after the domestic proceedings had ended.

62. Finally, and as regards the merits of the objection, the Court reiterates that according to its settled case-law the existence of a risk to an applicant under Article 3 of the Convention must be assessed by the Court primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion. However, if the applicant has not yet been expelled when the Court examines the case, the relevant time will be that of the proceedings before the Court (see,

among other authorities, *Saadi v. Italy* [GC], no. 37201/06, § 133, ECHR 2008, and *A.L. v. Austria*, no. 7788/11, § 58, 10 May 2012). If therefore the Court, according to its own case-law, can take material and events that date from a time after the domestic proceedings had ended into account when assessing the applicant's situation in the light of Article 3 pending an expulsion from the respondent State, the applicant's submissions in that regard cannot be deemed to render a complaint inadmissible for non-exhaustion of domestic remedies. The Court therefore rejects the Government's objection.

63. It further notes that the whole of the complaint below is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

64. The applicant reiterated that his father, who had been an officer in the Chechen security services, had been killed before his eyes in 2001 and that he himself had been arrested four times and only released after the payment of a ransom. Furthermore, he had been brutally beaten and injured during an identity check by Russian soldiers. The applicant's mother had been granted asylum in Austria solely on the basis that her husband had been killed and that her son, the applicant, had been arrested, threatened, beaten and injured. The applicant also asserted that he had withdrawn his appeal on the basis of wrong legal advice at the time and would have, in all probability, been awarded the same status as his mother if his appeal proceedings had continued. The authorities conducting the subsequent asylum proceedings should have known on the basis of the applicant's mother's asylum award that the dismissal of the applicant's asylum request had been unlawful and wrong. The applicant claimed that, due to the events described above, he would be at real risk of being arrested and ill-treated if he returned to Russia.

65. Furthermore, the traumatic events suffered in Russia had led to post-traumatic stress disorder and lasting reactive depression, and the applicant's mental health would deteriorate if he returned to Russia, especially in view of the fact that the negative asylum decisions had already had a detrimental effect on the applicant's mental health.

66. The Government contested the applicant's arguments and stated that it was first and foremost for the asylum-seeker to bring forward all arguments and reasons in the domestic proceedings to show that he was at real risk of being subjected to treatment contrary to Article 3 of the Convention if expelled.

67. That being said, the Government asserted that the applicant's reasons for leaving Chechnya had been thoroughly and carefully examined by the Federal Asylum Office in the first set of proceedings and had been found unconvincing. The applicant had not brought forward any relevant new information in the second set of proceedings. Furthermore, the country reports consulted by the authorities had not warranted, at the relevant time, the granting of subsidiary protection in the applicant's case.

68. As regards the applicant's state of health, the Government further observed that the applicant himself had stated in the proceedings before the Federal Asylum Office on 5 January 2011 that he was not taking any medication. Therefore, the Federal Asylum Office had rightly assumed that, in the absence of any information about possible health problems, the applicant would not suffer any damage to his health if he returned to Russia. Finally, the applicant had never informed the authorities that his mental health was deteriorating.

2. The Court's assessment

(a) General principles

69. It is the Court's settled case-law that as a matter of well-established international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States have the right to monitor the entry, residence and removal of aliens (see, among many other authorities, *Hilal v. the United Kingdom*, no. 45276/99, § 59, ECHR 2001-II, and *Saadi*, cited above, § 124). In addition, neither the Convention nor its Protocols confers the right to political asylum (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 102, Series A no. 215, and *Ahmed v. Austria*, 17 December 1996, § 38, *Reports* 1996-VI).

70. However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 implies an obligation not to deport the person in question to that country (see *Soering v. the United Kingdom*, 7 July 1989, §§ 90-91, Series A no. 161 and *Ahmed*, cited above, § 39). Furthermore, the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct (see *Chahal v. the United Kingdom*, 15 November 1996, § 79, *Reports* 1996-V, and *Saadi*, cited above, § 127).

71. The Court further observes that, having regard to the fact that Article 3 enshrines one of the most fundamental values of a democratic society, there must necessarily be rigorous scrutiny of an individual's claim that his or her deportation to a third country will expose that individual to treatment contrary to Article 3 (see *Jabari v. Turkey*, no. 40035/98, § 39,

ECHR 2000-VIII, *mutatis mutandis M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 293, ECHR 2011 and, most recently, *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 133, ECHR 2012).

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

72. First, examining the applicant's asylum proceedings, the Court notes that the applicant had consistently submitted to the Austrian authorities in the first and subsequent proceedings that he feared persecution if returned to Russia, because of his father's role in the Chechen security services and his murder in 2001. He further claimed to have been arrested four times, released against ransom, threatened and at least once severely beaten in the course of an identity check in 2004. The Court observes that in view of the information obtained by the Court *proprio motu* (see *H.L.R. v. France*, 29 April 1997, § 37, *Reports* 1997-III, and *Hirsi Jamaa and Others*, cited above, § 116) as well as the country report information available to and used by the domestic authorities at the time of their assessment of the applicant's subsequent asylum request, it has no doubt that the applicant's claim of a real risk of persecution upon a return to Russia already had, prima facie, some weight. All the materials consulted reported a deterioration in the general security situation in the North Caucasus region in the year 2009 and serious human rights violations throughout the region (see paragraphs 17 and 34-46 above).

73. The Court reiterates that the applicant relied on the same reasons for flight as his mother. After the Federal Asylum Office had reviewed the applicant's mother's asylum request, she had maintained the original flight story in her appeal proceedings and had been awarded the status of a recognised refugee in 2009 after the Asylum Court had considered that story to be credible and convincing and that there was a considerable risk of persecution for her. However, in the applicant's subsequent asylum proceedings, the authorities stated that his reasons for flight had been sufficiently thoroughly dealt with in his first proceedings, and continued to dismiss his request as *res judicata*. In this context the Court observes that it follows from the Federal Asylum Office's decision of 11 January 2011 (see paragraph 17 above) and from the Asylum Court's decision of 1 April 2011 (see paragraph 20 above) that the asylum authorities had been aware of the applicant's mother's asylum status in Austria. However, it also follows from the facts of the case that, in the applicant's subsequent proceedings, the domestic authorities did not examine the connections between his and his mother's proceedings and any possible similarities or potential distinctions of these two cases.

74. Furthermore, the Court notes that the Government has not brought forward any argument in their submissions to the Court as regards the discrepancy between the assessment of the applicant's subsequent asylum request and his mother's status as a recognised refugee. The Government

asserted that the applicant's claims had been thoroughly examined in the first asylum proceedings conducted by the Federal Asylum Office and found unconvincing. The Court finds however that that argument does not take into account that the first asylum decision rendered in respect of the applicant's mother had been overturned by the Asylum Court, and that her story, which is the same as the applicant's, was found not only convincing, but credible after an oral hearing and witness statements.

75. Having regard to the foregoing, the Court is not persuaded that the applicant's grievance was thoroughly examined by the domestic authorities, and has accordingly to assess whether there exists a real risk that the applicant would be subjected to treatment contrary to Article 3 if expelled to Russia.

76. Since the applicant has not yet been removed from Austria, the relevant time to examine this question is in the proceedings before the Court (see paragraph 62 above).

77. As regards the applicant's individual situation, the Court reiterates that the triggering event of the applicant's and his mother's flight, namely the position of the applicant's father in the security services and his murder, had already been considered credible and convincing in the applicant's mother's asylum proceedings in Austria. In view of the fact that the domestic authorities are much better placed to evaluate the statements and evidence brought directly before them (see, *mutatis mutandis, S.S. v. the United Kingdom* (dec.), no. 12096/10, § 77, 24 January 2012), the Court has no reason to doubt the assessment by the Asylum Court of the credibility of the applicant's mother's – and thus the applicant's – reasons for flight. The Court further observes that the applicant has also provided it with a diagnostic letter based on a CT scan that showed old facial bone conversions corresponding with the applicant's own account of having been subjected to beatings.

78. Consequently, the Court notes that it is in a position to assess the applicant's individual risk factors on the basis of the domestic asylum proceedings for the applicant's mother's asylum request. It notes that not only did the domestic authorities find the applicant's mother's flight story convincing and credible, they also awarded her the status of a recognised refugee and thus established that she was at real risk of persecution solely because of the former position and murder of her husband. There is no indication in the documents before the Court that the applicant, who relied and still relies on the same reasons for flight, would be at a lesser risk of persecution upon a return to Russia than his mother, as a family member of his late father. The Court further observes that the domestic authorities excluded an alternative for the applicant's mother to stay in other parts of Russia. Again, there is no basis for the Court to believe the assessment result to be different for the applicant himself. And finally, the Court also notes that the applicant's mother was awarded her title as a recognised

refugee in May 2009. The Court finds that the time elapsed since that decision is not of such a length as to lead automatically to the drawing of a conclusion to the contrary.

79. Overall, and as regards the applicant's individual risk assessment, the Court finds that there is a strong indication that the applicant would be at real risk of being subjected to treatment contrary to Article 3 of the Convention if removed to Russia. The Court will now turn to the general security situation and examine whether recent general developments in Chechnya might change that assessment substantially.

80. The Court firstly reiterates that it has found violations of Articles 2 or 3 of the Convention in numerous judgments in respect of disappearances and ill-treatment in Chechnya (see, among others, *Imakayeva v. Russia*, no. 7615/02, ECHR 2006-XIII (extracts); *Alikhadzhiyeva v. Russia*, no. 68007/01, 5 July 2007; *Sambiyeva v. Russia*, no. 20205/07, 8 November 2011; *Chitayev and Chitayev v. Russia*, no. 59334/00, 18 January 2007; and *Khadisov and Tsechoyev v. Russia*, no. 21519/02, 5 February 2009). Although these judgments relate to events dating back several years, they provide a general background for the Court's assessment of the present application.

81. As regards the most recent developments, the Court, referring to country information obtained *proprio motu*, observes that, whereas the reports consulted showed that the activity of armed groups and the general level of violence in Chechnya had decreased in comparison with the development in Dagestan, the information nevertheless still provided a picture of regularly occurring human rights violations committed by both the rebel groups and the security forces and of a climate of impunity and lack of effective investigations of disappearances and acts of ill-treatment. The reports also still referred to the practice of reprisals and collective punishment of relatives and suspected supporters of alleged insurgents (see the summaries in the paragraphs 47-55 above).

82. While the Court acknowledges that general outbreaks of violence and of serious human rights abuses seem to be decreasing in number in Chechnya, occurrences of targeted human-rights violations, such as abductions, killings or beatings, still seem to be happening on a regular basis. The Court therefore does not find that the reports consulted – including the most recent available ones - are likely to dispel the concerns raised as regards the applicant's individual risk of persecution if he returned to Russia.

83. In the light of the foregoing the Court comes to the conclusion that it has been demonstrated that there are substantial grounds to believe that the applicant would face a real and individual risk of being subjected to treatment contrary to Article 3 if he returned to Russia.

84. The Court now turns to the applicant's complaint as regards the implications removing him to Russia could have for his mental health. In

this context, the Court reiterates its findings in the case of *N. v. the United Kingdom* (see *N. v. the United Kingdom* [GC], no. 26565/05, ECHR 2008) that concluded that the Court's principles, as applicable to such a complaint, were as follows in its paragraphs 42 to 44:

> "42. In summary, the Court observes that since *D. v. the United Kingdom* [see *D. v. the United Kingdom*, 2 May 1997, *Reports of Judgments and Decisions* 1997-III] it has consistently applied the following principles.
>
> Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In the *D.* case the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.
>
> 43. The Court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in *D. v. the United Kingdom* and applied in its subsequent case-law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.
>
> 44. Although many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights (*Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, § 26). Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, § 89). Advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting State and the country of origin may vary considerably. While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States."

85. The Court accepts that the applicant was suffering, according to the medical letters he has provided, from post-traumatic stress disorder and depression. It further acknowledges that the doctors treating him recommended ongoing pharmacological and psychotherapeutical treatment. However, the Court is mindful of the high threshold set in the Court's

jurisprudence as regards the very exceptional circumstances required to raise an issue under Article 3 of the Convention when it comes to access to health care in removal cases (see also, additionally to the quotation in the paragraph above, *Bensaid v. the United Kingdom*, no. 44599/98, § 40, ECHR 2001-I). In the present case the Court is not convinced that the applicant's mental health status and its alleged expected deterioration in the event of his being removed to Russia amount to such "very exceptional circumstances" and could thus trigger the application of Article 3 of the Convention.

86. However, the Court reiterates its findings in paragraph 83 above as regards a real and individual risk that the applicant would be subjected to treatment within the meaning of Article 3 of the Convention, and, in the light of its overall examination of the applicant's complaint under that Article, draws the conclusion that there would be a violation of Article 3 of the Convention if the applicant was removed to Russia.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

87. The applicant also complained of a violation of his right to respect for his family life, in that removal to Russia would separate him from his wife and two children. He relied on Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

88. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

89. The applicant emphasised that his wife had been a recognised refugee in Austria since 2004 and that his two children, who were both born in Austria, also had resident status under the asylum law. He claimed that

removal to Russia would mean *de facto* permanent separation from his core family in Austria, and alleged that the Austrian authorities had not sufficiently balanced the conflicting interests involved in the decision. With regard to his criminal convictions, the applicant contended that since his last conviction in 2008 he had not been implicated in any other criminal or police investigations and had a very good future prognosis. Expulsion would therefore be at variance with his right to respect for his family life.

90. The Government contested those arguments and emphasised that the applicant had not demonstrated that he was integrated into Austrian society, and also emphasised that he had serious criminal convictions in Austria. Furthermore, the applicant had started a family without ever having permanent residence status in Austria. He and his wife must therefore have been aware of the applicant's precarious residence status there.

2. The Court's assessment

91. The Court reiterates its finding that removing the applicant to Russia would violate Article 3 of the Convention (see paragraph 86 above). Having no reason to doubt that the respondent Government would comply with the present judgment, it considers that it is not necessary to examine the hypothetical question whether, in the event of the applicant's removal to Russia, there would also be a violation of Article 8 of the Convention (see *Saadi*, cited above, § 170).

III. RULE 39 OF THE RULES OF COURT

92. The Court reiterates that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

93. It considers that the indication made to the Government under Rule 39 of the Rules of Court (see above § 4) must continue in force until the present judgment becomes final or until the Court takes a further decision in this connection (see operative part).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

94. 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

95. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

96. The Government claimed that the applicant had not sufficiently demonstrated that there had been damage or that there was a causal link between the alleged damage and the violation of the Convention.

97. The Court considers that the finding that the applicant's removal, if carried out, would breach Article 3 of the Convention constitutes sufficient just satisfaction for non-pecuniary damage sustained by the applicant (see *Saadi*, cited above, § 188).

B. Costs and expenses

98. The applicant also claimed EUR 6,114.96 for costs and expenses incurred before the domestic authorities and before the Court. This sum includes value-added tax (VAT).

99. The Government firstly contended that the amount claimed by the applicant and the calculation breakdown provided in this regard did not correspond. They further point out that domestic fee rates would only serve as indicators for the award of reimbursement of procedural costs. As regards the amount claimed for costs incurred in the proceedings before the Court, the Government found them to be excessive.

100. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum.

101. On the basis of the calculation breakdown the applicant has provided, he appears to be claiming EUR 2,128.98 for costs and expenses incurred before the domestic authorities and EUR 2,902.25 for those incurred before the Court. These sums include VAT. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award these sums, so a total of EUR 5,031.23 covering costs under all heads. This sum includes VAT.

C. Default interest

102. 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 the applicant's removal to Russia would violate Article 3 of the Convention;

3. *Holds* that there is no need to examine the complaint under Article 8 of the Convention;

4. *Decides* to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to expel the applicant until such time as the present judgment becomes final or until a further order is made;

5. *Holds* that the finding of a violation constitutes sufficient just satisfaction for non-pecuniary damage sustained by the applicant;

6. *Holds*
   (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,031.23 (five thousand and thirty-one euros and twenty-three cents) in respect of costs and expenses. This sum includes VAT;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 28 March 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Registrar	Isabelle Berro-Lefèvre President