



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

FIRST SECTION

CASE OF MALIKA DZHAMAYEVA AND OTHERS v. RUSSIA

(Application no. 26980/06)

JUDGMENT

STRASBOURG

21 December 2010

FINAL

20/06/2011

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

In the case of Malika Dzhamayeva and Others v. Russia,

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

Christos Rozakis, *President*,

Anatoly Kovler,

Elisabeth Steiner,

Dean Spielmann,

Sverre Erik Jebens,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 2 December 2010,

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

PROCEDURE

1. The case originated in an application (no. 26980/06) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by four Russian nationals, listed in paragraph 7 below (“the applicants”), on 21 May 2006 and 31 July 2008.

2. The applicants were represented by Mr D. Itslyayev, a lawyer practising in Grozny. The Russian Government (“the Government”) were represented by Mr G. Matyushkin, the Representative of the Russian Federation at the European Court of Human Rights.

3. On 4 July 2008 the Court decided to apply Rule 41 of the Rules of Court and to grant priority treatment to the application and to give notice of the application to the Government. Under the provisions of former Article 29 § 3 of the Convention it decided to examine the merits of the application at the same time as its admissibility.

4. On 29 August 2008 the President of the First Section decided, under Rule 38 A of the Rules of Court, to allow the second to fourth applicants (see below) to join the proceedings and decided that the parties should submit further written observations under Rule 54 § 2 (c) of the Rules of Court.

5. The President of the Chamber acceded to the Government's request not to make publicly accessible the documents from the criminal investigation file deposited with the Registry in connection with the application (Rule 33 of the Rules of Court).

6. The Government objected to the joint examination of the admissibility and merits of the application and to the application of Rule 41 of the Rules

of Court. Having considered the Government's objection, the Court dismissed it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicants are:

- 1) Ms Malika Dzhamayeva, born in 1957
- 2) Ms Kheda Mamayeva, born in 1978,
- 3) Mr Imam Mukayev, born in 2002, and
- 4) Mr Ovkhad Mukayev, born in 2004.

8. The applicants live in Katyr-Yurt, in the Chechen Republic.

9. The first applicant is the mother of Khamid Mukayev, born in 1978. The second applicant is Khamid Mukayev's wife and the third and fourth applicants are their children.

A. Disappearance of Khamid Mukayev

1. The applicants' account

10. At the material time the first applicant lived with her son Khamid Mukayev, the second to fourth applicants and other relatives at 10 Pervogo Maya Street (in the submitted documents the address is also referred to as 10 Pervogo Maya Lane and 25 Pervomayskaya Street), Katyr-Yurt, in the Achkhoy-Martanovskiy district of the Chechen Republic.

11. On the night of 15 September 2004 the above-mentioned persons and P.B. were staying at the applicants' house.

12. Between 4 and 5 a.m. on 16 September 2004 a convoy of military vehicles, including an armoured personnel carrier (APC) and Gazel and UAZ vehicles, arrived at the applicants' gate. The vehicles had no registration numbers. A group of about twenty-five to thirty armed masked men in camouflage uniforms got out of the vehicles. Some of them stayed outside, securing the perimeter of the applicants' house.

13. At about 4 a.m. on 16 September 2004 the first applicant was woken up by the barking of her dog. Shortly afterwards seven or eight armed masked men in camouflage uniforms and bullet-proof jackets burst into the house.

14. The intruders did not introduce themselves or explain the reason for their actions. They pointed their guns at the first applicant and her relatives and ordered them in unaccented Russian to get outside. The applicants

inferred that the intruders were servicemen. In the courtyard the first applicant saw a large group of armed servicemen in camouflage uniforms and masks. The servicemen tied the first applicant's and her relatives' hands with adhesive tape. They also tied the first applicant and her other son, Kh.M., to a shed post. The first applicant's eighty-four-year-old mother-in-law, Ms M. M., stayed in the house. In a state of stress, Ms M. M. started shouting and the servicemen hit her several times with their rifle butts.

15. Meanwhile some of the servicemen who were in the house started searching it and some burst into the room where the second to fourth applicants and Khamid Mukayev were staying. They pointed their guns at the second applicant and ordered her in unaccented Russian to stay quiet. The servicemen then ordered Khamid Mukayev to lie down. After a quick search of the room they took Khamid Mukayev, who was in his underwear, to the yard. The second applicant tried to follow them but was forced back into the room under the threat of being shot dead. In the yard one of the servicemen took the tape off the first applicant's mouth and asked her where her husband was. She replied that she did not know and that he had left the family in 1992.

16. Having checked the house and attic, the servicemen started beating Khamid Mukayev up, requesting him to give them his passport. He replied that the first applicant had it. The servicemen untied her hands and brought her into the house. In the house she saw her mother-in-law Ms M. M., who was leaning against the wall and coughing up blood. The first applicant gave Khamid Mukayev's passport to the servicemen. At that moment one of the servicemen in the yard ordered the others to retreat. While the first applicant looked back to where Ms M. M. was standing, she saw that the latter had fallen to the ground. Shortly after this the first applicant heard military vehicles. She realised that the servicemen were taking Khamid Mukayev away and asked them not to. They ordered her to remain silent and then two servicemen took the first applicant and her other son into the passageway, tied their hands and legs with adhesive tape and put them on to the floor. After asking the first applicant "What is wrong with your granny?" and received the reply that she was Category 1 disabled, the servicemen closed the door and left, taking Khamid Mukayev with them.

17. The abduction of Khamid Mukayev was witnessed by a number of the applicants' neighbours.

18. At about 4 a.m. on 16 September 2004 the applicants' neighbour A.Kh., who lived in Pervogo Maya Street, was woken up by the noise of military vehicles. When he went outside he saw a convoy consisting of an APC with a large number of servicemen on it and Gazel and UAZ vehicles on the Pervogo Maya Street. He immediately went back into his house. Some fifteen to twenty minutes later he again heard the noise of the vehicles coming from the street. When he looked outside his window, he saw the

same vehicles reversing. Shortly after this his nephew I.M. came to his house and told him that Russian servicemen had taken away Khamid Mukayev and that they had killed Ms M. M.

19. During the night of 15-16 September 2004 M.F., who lived at 12 Pervogo Maya Street, was woken up by the noise of vehicles. When she looked outside the window, she saw an APC, a white Gazel vehicle, a light-coloured UAZ vehicle and a large group of armed masked men going towards the applicants' house. The vehicles had no licence plates. A group of servicemen secured the perimeter of the house. M.F. went home to get dressed but when she got outside, the APC was already driving back and the servicemen sitting on it pointed their guns at her. Once the APC had moved away, M.F. went to the applicants' house and was told about the abduction of Khamid Mukayev and the murder of Ms M. M.

20. On the night of 15-16 September 2004 A.M. was woken up by noise coming from the applicants' house. When he came closer to the applicants' house through his vegetable garden he saw Gazel and UAZ vehicles parked at the applicants' gate. Afraid to approach closer, he returned home. Some twenty minutes later I.M. came to his house and told him that servicemen had abducted Khamid Mukayev and killed Ms M. M.

21. The description of the events of 16 September 2004 is based on the first applicant's submissions in her application forms of 21 May and 25 July 2006 and the applicants' account given in the application form of 11 March 2008; accounts given to the applicants' representatives by the following witnesses: an account by P.B. given on 5 March 2008; an account by A.Kh. given on 14 February 2008; an account by M.F. given on 12 February 2008; an account by A.M. given on 15 February 2008; an account by the first applicant made on 11 March 2008, and an account made by the second applicant on 20 February 2008.

22. The applicants have had no news of Khamid Mukayev since 16 September 2004.

2. Information submitted by the Government

23. The Government did not dispute most of the applicants' submissions but claimed that the domestic investigation had established neither the implication of servicemen in the abduction of Khamid Mukayev nor that the abductors had used military vehicles.

B. The search for Khamid Mukayev and the investigation

1. The applicants' account

(a) The applicants' search for Khamid Mukayev

24. After the departure of the servicemen on 16 September 2004 with Khamid Mukayev a number of neighbours gathered at the applicants' place. Meanwhile the first applicant's other son, I.M., untied her. Immediately thereafter the first applicant and M.F. ran after the military vehicles, which they saw going into Pervomayskaya Street. On their way the women alerted the local police inspector, M.A., who lived 100 metres from the applicants' house, about the abduction of Khamid Mukayev. M.A. did not say anything to the women and went back into his house.

25. Shortly after this the first applicant asked her neighbour, D.M., for help. He promised her to follow the servicemen in his private car and told her to go home, which she did.

26. When she arrived home the first applicant discovered that her mother-in-law was dead.

27. At about 9 a.m. on 16 September 2004 police officers of the Achkhoy-Martanovskiy Department of the Interior (ROVD), including local police inspector M.A., came to the applicants' house. They interviewed the applicants and some of their neighbours and left.

28. On 18 or 19 September 2004 a group of police officers visited the first applicant and told her to come to the ROVD.

29. At the ROVD an officer brought the first applicant to the head of the criminal police department, Mr K. He told her that Khamid Mukayev was in good health, that he was not under the control of the ROVD but that the ROVD was in contact with the "structures which were holding the first applicant's son". He then asked the first applicant about the whereabouts of her husband, who had participated in illegal armed groups during the first Chechen campaign, and explained her that it was in her interest to provide that information. He also asked her if she knew any Wahhabis in her village.

30. Subsequently, the local police officer frequently questioned the first applicant about her husband, from which she inferred that the authorities had abducted Khamid Mukayev, because they were still looking for her husband, despite the fact that the latter had been amnestied meanwhile.

(b) Investigation of the abduction of Khamid Mukayev

31. On 16 September 2004 the prosecutor's office of the Achkhoy-Martanovskiy District ("the district prosecutor's office") instituted a criminal investigation into the abduction of Khamid Mukayev and the causing of M.M.'s death under Articles 126 § 2 (aggravated kidnapping) and

111 § 4 of the Criminal Code, respectively. The case file was given the number 38041.

32. On 17 September 2004 the district prosecutor's office granted the second applicant victim status in connection with the proceedings in case no. 38041.

33. On 11 November 2004 the district prosecutor's office informed the Mukayev family that the time-limits for the investigation in criminal case no. 38041 had been extended to 16 December 2004.

34. On 11 July 2005 the military commander of the Chechen Republic forwarded the first applicant's complaint about her son's abduction to the Achkhoy-Martanovskiy district military commander's office (the district military commander's office) for examination, and ordered the latter body to search for Khamid Mukayev.

35. On 15 July 2005 the district prosecutor's office replied to the first applicant's complaint about her son's abduction and informed her that the complaint had been appended to case file no. 38041; that on an unspecified date the investigation of the abduction had been suspended, and unspecified operational and search measures aimed at solving the crime were under way.

36. On 18 July 2005 the district military commander's office informed the first applicant that on 16 September 2004 they had not been conducting any special operations in Katyr-Yurt. The letter also stated that the authorities had forwarded information requests concerning the whereabouts of Khamid Mukayev to various law-enforcement agencies in the Chechen Republic.

37. On 14 March 2006, in reply to the second applicant's request for information, the district prosecutor's office wrote to her that they had been undertaking unspecified operational and search measures aimed at establishing the whereabouts of Khamid Mukayev, but that those measures had failed to produce any results. The letter also stated that the investigation in the criminal case could be resumed upon receipt of new relevant information.

38. On 18 April 2006 the district prosecutor's office informed the first applicant that they had undertaken the following investigative steps in criminal case no. 38041: examination of the crime scene; forensic examination of the body of M.M.; granting victim status in the criminal case to relatives of the disappeared Khamid Mukayev; questioning of a number of local residents about the abduction; collaboration with a number of other law-enforcement bodies to establish the whereabouts of the applicants' relative. In addition, the supervising prosecutor had issued unspecified instructions aimed at solving the crime and these instructions had been complied with by the investigation. According to the letter, the investigation was examining the theory of the possible involvement of Russian servicemen in the crime, as well as the theory that Khamid Mukayev had

been kidnapped for ransom. Finally, the document stated that the investigation in criminal case no. 38041 had been suspended on 16 January 2005; however, the operational and search measures aimed at solving the crime were under way.

39. On 10 July 2006 the second applicant wrote to the district prosecutor's office, requesting information on the progress of the investigation and seeking information on the outcome of her previous enquiries, to which she had received no replies. She submitted that, in the absence of information, she was prevented from challenging the investigation omissions before other authorities. She also sought access to the case file and permission to make copies from it. Lastly, she requested that the investigation be reopened if it had been suspended.

40. On 1 November 2006 the deputy prosecutor of the Achkhoy-Martanovskiy district quashed the decision of 16 January 2005 to suspend the investigation in case no. 38041 as premature and unfounded, finding that the investigation had failed to take all steps necessary to establish the applicants' relative's whereabouts and to identify the perpetrators. In particular, the investigation had failed to interview officers A. T., A. M., T.Sh., I.Dzh., and R.B. of the ROVD, who had been on duty on 15-16 September 2004 at checkpoint no. 1, located at the entry to Achkhoy-Martan; it also had not interviewed as witnesses five residents of Achkhoy-Martan, whose testimony could have had an important bearing on the establishment of the circumstances of the case. The investigation also failed to take all measures to identify other witnesses and eyewitnesses to the abduction and the perpetrators. No measures aimed at identifying the owners of the APC and the Gazel vehicles were taken. The deputy prosecutor ordered the district prosecutor's office to enlarge the circle of eventual witnesses to the abduction, to take all relevant investigative steps and to coordinate its efforts with other State authorities. It is not entirely clear whether the deputy prosecutor's instructions have been complied with.

41. On 1 December 2006 the district prosecutor's office suspended the investigation in case no. 38041 for failure to identify the perpetrators. The decision noted that the investigation had taken a number of investigative steps. In particular, the crime scene had been inspected; a forensic examination of the body of Ms M.M. had been carried out; a plan of operational and search measures had been compiled; the second applicant had been granted victim status and interviewed; relatives and neighbours of the kidnapped person, as well as residents of Katyr-Yurt and unspecified police officers of the ROVD had been interviewed; servicemen from checkpoint no. 186 had been interviewed; registration logs from checkpoints located in the Achkhoy-Martanovskiy District had been examined; character references in respect of Khamid Mukayev had been collected; and unspecified requests had been sent to various law-enforcement authorities in the Chechen Republic.

42. By a letter of 12 February 2008 investigator K. of the Achkhoy-Martanovskiy Interdistrict investigating department of the Investigating Department with the Prosecutor's office of the Chechen Republic (the investigating department) replied to the second applicant's request for information that, until the termination of the investigation, she was only entitled to have access to the documents from case file no. 38041 which pertained to the investigative actions taken with her participation, and that she could be provided with access to the entire file only upon the termination of the investigation.

43. On 11 March 2008 the second applicant complained to the Achkhoy-Martanovskiy District Court (the District Court) that the investigating authorities had taken no action in case no. 38041. She submitted, in particular, that the investigator's refusal to grant her access to the case file had prevented her from getting information on the progress of the investigation into the abduction of her husband and from effectively challenging its omissions before the domestic authorities.

44. By a decision of 26 March 2008 the District Court granted the second applicant's claims in part. It held that the investigator's permission to the applicant to have access only to the records of investigative steps taken with her participation was unlawful and in breach of the Criminal Procedure Code and the practice of the Constitutional Court. In particular, it referred to the Constitutional Court's finding that a victim could have access to decisions to charge particular persons with a crime, to the information on the composition of the investigating group, decisions to order various expert examinations and their conclusions and complaints of other participants to the criminal proceedings, if those documents and that information pertained to the victim's rights and legal interests. It was for the investigator to determine the manner and conditions of a victim's access to the relevant information, regard being had to the requirements of the interests of the investigation. At the same time, the second applicant's request for access to all the materials in the case file could not be granted until the investigation had been concluded.

45. On 14 May 2008 the Supreme Court of the Chechen Republic dismissed the second applicant's appeal against the decision of 26 March 2008.

2. Information submitted by the Government

46. The Government did not make detailed submissions on the course of the investigation.

47. They stated that the investigation had interviewed eyewitnesses to the abduction and over forty residents of the village; had inspected the crime scene; had carried out a forensic examination of the fingerprints left presumably by the abductors; had examined the body of M. M., and had

sent numerous requests to various State authorities in connection with the abduction of the applicants' relative.

48. Despite specific requests by the Court, the Government did not disclose most of the contents of criminal case no. 38041, providing only copies of the following documents: the decision to institute the investigation; the record of examination of the body of M. M. and its photographs; the crime scene inspection report and a copy of the sketch of the premises; the decision to grant the second applicant victim status; the decision to order a fingerprint examination; the fingerprint expert's report; the forensic report of examination of M. M., and replies from the authorities mentioned in paragraph 63 below. The Government also submitted interview records in respect of the first and second applicants, D.M., Z.M., M.F., L.M., R.A. and M.A. and another thirty residents of Katyr-Yurt (see paragraph 59 below). The Government claimed that the documents furnished by them were the only case file materials they could submit to the Court without prejudice to the interests of the parties to the criminal proceedings.

49. Some of the documents submitted by the Government were illegible and some documents were legible only in part.

50. The information contained in the documents submitted by the Government may be summarised as follows.

51. On 16 September 2004 officers of the ROVD examined the body of M. M. and photographed it.

52. On the same date they inspected the crime scene. According to the crime scene inspection report, the entry door to Khamid Mukayev's room was broken and there were tracks described as "presumably those of an APC" in the courtyard of the applicants' house. It further emerges from the report that some fingerprints were taken during the inspection.

53. On 16 September 2004 the ROVD officers interviewed as a witness D.M., who lived at 21, Pervogo Maya Street. D.M. stated that on the night of 15-16 September 2004 he went outside to relieve himself. At that moment he heard the noise of an APC. Immediately thereafter he saw a light-coloured Gazel vehicle without registration plates come into Pervogo Maya Street. It was followed by a UAZ vehicle and an APC. Shortly after this the first applicant came to D.M.'s house and told him that her mother-in-law had been killed and her son abducted, upon which D.M. got into his car and followed the military convoy he had seen before. He caught up with it and saw that it was moving in the direction of Achkhoy-Martan. On its way the convoy passed checkpoint no. 186 without being stopped there. When D. M. approached that checkpoint, police officers stationed there stopped him and told him that he could not go any further and that the movement of vehicles was prohibited because of the curfew.

54. On 17 September 2004 the investigation interviewed the second applicant as a witness. She submitted that at about 4 a.m. on 16 September

2004 she had been woken up by M.M. shouting for help. Immediately thereafter several armed masked men in camouflage uniforms burst into the room she was sharing with Khamid Mukayev and ordered him in unaccented Russian to lie down and not to move. The intruders then took him outside in his underwear. When the second applicant tried to follow, the intruders threatened her with their guns and ordered to stay inside. When she managed to get outside, she saw I.M., who was untying the first applicant, and Ms M.M., who was lying on the floor covered in blood. The intruders had arrived on an APC and in two Gazel vehicles without registration plates.

55. Kh.M., interviewed as a witness on 17 September 2004, submitted that he had stayed in the applicants' house on the night of 15-16 September 2004. At about 5 a.m. on 16 September 2004 he had been woken up by the dog barking. Shortly after this a group of twenty-five to thirty armed masked men in camouflage uniforms burst into the applicants' property. They tied Kh.M.'s and the first applicant's hands with adhesive tape and put both of them on the floor. Then the intruders took Khamid Mukayev, who was in his underwear, outside. From the neighbours Kh.M. learnt that the intruders had arrived in an APC and two Gazel vehicles.

56. Z.M., residing at 1, Pervogo Maya Street and interviewed as a witness on an unspecified date in September 2004, stated that at about 5 a.m. on 16 September 2004 she had been woken up by the noise of military vehicles. When she went outside she saw an APC with a large group of armed masked men in camouflage uniforms. Shortly afterwards she heard shouting coming from the applicants' house and subsequently, when she arrived there, she learnt about the killing of Ms M.M. and the abduction of Khamit Mukayev.

57. On 5 October 2004 the investigator in charge of the case ordered a forensic examination of the three fingerprints taken in Khamid Mukayev's room during the crime scene inspection. On the same date the expert found that the fingerprints collected were not suitable for identification.

58. On 6 October 2004 the investigation interviewed the first applicant as a witness. She stated that at about 5 a.m. on 16 September 2004 she had been woken up by the barking of her dog. Shortly afterwards a group of armed masked men in camouflage uniforms had burst into the house. Some of the armed men had stayed in the yard. There were in total about twenty-five to thirty of them. The intruders took Khamid Mukayev outside in his underwear and beat up M. M., who died as a result of the beatings. According to the neighbours, the armed men had arrived in an APC and two Gazel vehicles. They spoke unaccented Russian.

59. Between 13 October and 28 December 2004 and on 16 November 2006 the investigation interviewed as witnesses thirty residents of Katyr-Yurt. According to their interview records, those persons submitted that they had learnt from the applicants or from other residents of

Katyr-Yurt that between 4 and 5 a.m. on 16 September 2004 a large group of armed masked men in camouflage uniforms, who had arrived in an APC and Gazel and UAZ vehicles, had burst into the applicants' house, had kidnapped Khamid Mukayev and beaten Ms M.M. to death.

60. On 14 November 2006 the investigation interviewed M.F., who lived at 26 Pervomayskaya Street, as a witness. She submitted that at about 4 a.m. on 16 September 2004 she had been woken up by the noise of several vehicles. When she got outside she saw two light-coloured Gazel vehicles without registration plates. M.F. heard a walkie-talkie in one of the vehicles but could not catch what the people were saying over it. A man in a camouflage uniform with a sub-machine gun was standing near the vehicles. Suddenly another armed man in camouflage ran to him and ordered him in Russian to get the vehicles to the applicants' house. When the vehicles arrived there, about ten armed camouflaged men got into them. Shortly thereafter the two vehicles started taking off. They were followed by an APC with several servicemen on it. Once the convoy had left, M.F. ran to the applicants' house, where she was told that the servicemen had taken away Khamid Mukayev and killed Ms M.M.

61. L.M., interviewed as a witness on 6 November 2006, stated that at about 4 a.m. on 16 September 2004 he had been woken up by the noise of an APC. He looked out of the window and saw that an APC had entered Katyr-Yurt from the direction of Achkhoy-Martan and that it was in Pervomayskaya Street.

62. R.A., interviewed as a witness on 7 November 2006, and M.A., interviewed on 17 November 2006, who both lived in Pervomayskaya Street, stated that at about 4 a.m. on 16 September 2004 they had been woken up by the noise of military vehicles and, looking out of their windows, saw an APC near the applicants' house.

63. According to replies from SIZOs no. 1 of the Chechen Republic and the Dagestan Republic, the Zavodskoy, Leninskiy, Shalinskiy, Achkhoy-Martanovskiy and Gudermesskiy interdistrict investigating departments and the Achkhoy-Martanovskiy department of the FSB, those State authorities had no information on Khamid Mukayev's eventual arrest or detention, his whereabouts or on any criminal proceedings against him. The above-mentioned documents were dated between 4 and 10 September 2008 and were sent to the investigating authority in case no. 38041 in reply to its requests for information made in September 2008.

64. The Government submitted that the investigation in case no. 38041 was pending.

C. Court proceedings to have the applicants' relative declared a missing person

65. On 18 April 2006 the Achkhoy-Martanovskiy District Court granted the second applicant's request and declared Khamid Mukayev a missing person.

II. RELEVANT DOMESTIC LAW

66. For a summary of the relevant domestic law see *Akhmadova and Sadulayeva v. Russia* (no. 40464/02, §§ 67-69, 10 May 2007).

THE LAW

I. THE GOVERNMENT'S OBJECTION REGARDING NON-EXHAUSTION OF DOMESTIC REMEDIES

A. The parties' submissions

67. The Government contended that the complaint should be declared inadmissible for non-exhaustion of domestic remedies. They submitted that the investigation into the disappearance of Khamid Mukayev had not yet been completed. They further argued that the second applicant, who had been granted victim status in the proceedings concerning the abduction of her husband, could have lodged oral and written requests with those conducting the investigation and thereby assisted it in establishing what had happened. Moreover, it was open to all applicants to complain about the investigation omissions to the courts under Article 125 of the Criminal Procedure Code (CCP). They also stressed that, despite the Achkhoy-Martanovskiy District Court's decision to grant in part the second applicant's claims relating to access to the case file materials, she had never made complaints to courts about the quality of the investigation.

68. In this respect the Government referred to the cases of a certain A., S. and E., whose complaints about investigations had, they said, been allowed by the courts. The Government did not enclose copies of the decisions they referred to.

69. They also argued that it had been open to the applicants to pursue civil complaints but that they had failed to do so. In that connection they referred to favourable court decisions in the cases of Kh., R. and an unnamed person, without providing copies of those decisions.

70. The applicants contested that objection. They stated that the criminal investigation had proved to be ineffective. As regards the Government's argument concerning the second applicant's victim status, they stated that it was the authorities' obligation to conduct an effective investigation, without leaving the initiative to the next of kin of the missing person. In any event, that remedy could be hardly considered effective, given that the applicants had not been provided with the basic information concerning the investigation. They also stressed that under the decision of 26 March 2008 the second applicant would only have access to her own interview records and the decisions to institute, suspend and reopen the investigation. However, while the content of those procedural acts was known to the applicants, they were unaware of any other steps taken by the investigation, or of their results.

71. As regards the opportunity to challenge the investigators' omissions in court, they stressed that, even if a court had ordered the investigating authority to reopen the investigation, nothing would have prevented the latter body from suspending it again. In fact, in the applicants' case the investigation was reopened several times, but nothing indicated that the reopening entailed additional and relevant investigative actions on the part of the investigating authority. Against that background it would be unreasonable to require the applicants to challenge in court every act or omission of the investigation, particularly taking into account that the State authorities were under an obligation to act of their own motion. As regards the examples referred to by the Government, the applicants argued that, to their knowledge, the court decisions ordering the investigating authorities to reopen the investigation had no bearing on the progress of investigation. The applicants also stated that in a number of cases before the Court concerning similar events, where the investigation was ineffective, the applicants' complaints under Article 125 of the CCP had not brought about any positive results. They referred, among others, to the cases of *Vakhayeva and Others v. Russia* (no. 1758/04, 29 October 2009) and *Alaudinova v. Russia* (no. 32297/05, 23 April 2009).

B. The Court's assessment

72. The Court will examine the arguments of the parties in the light of the provisions of the Convention and its relevant practice (for a relevant summary, see *Estamirov and Others v. Russia*, no. 60272/00, §§ 73-74, 12 October 2006).

73. The Court notes that the Russian legal system provides, in principle, two avenues of recourse for the victims of illegal and criminal acts attributable to the State or its agents, namely civil and criminal remedies.

74. As regards a civil action to obtain redress for damage sustained through the alleged illegal acts or unlawful conduct by State agents, the

Court has already found in a number of similar cases that this procedure alone cannot be regarded as an effective remedy in the context of claims brought under Article 2 of the Convention (see *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, §§ 119-121, 24 February 2005, and *Estamirov and Others*, cited above, § 77). In the light of the above, the Court confirms that the applicants were not obliged to pursue civil remedies. The Government's objection in this regard is thus dismissed.

75. As regards criminal-law remedies, the Court observes that the applicants complained to the law-enforcement authorities immediately after the kidnapping of Khamid Mukayev and that an investigation has been pending since 16 September 2004. The applicants and the Government dispute the effectiveness of the investigation of the kidnapping.

76. The Court considers that the Government's objection raises issues concerning the effectiveness of the investigation which are closely linked to the merits of the applicants' complaints. Thus, it decides to join this objection to the merits of the case and considers that the issue falls to be examined below.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

77. The applicants complained under Article 2 of the Convention that their relative had been deprived of his life by the servicemen and that the domestic authorities had failed to carry out an effective investigation of the matter. Article 2 reads:

“1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

A. Submissions by the parties

78. The Government argued that the domestic investigation had obtained no evidence that State agents had been involved in the abduction of Khamid Mukayev or that any special operations had been conducted in the village of Katyr-Yurt on the night of his kidnapping. The fact that the abductors had

been wearing uniforms, were armed and spoke Russian did not prove that they were servicemen. Moreover, none of the witnesses to the abduction, including the applicants, was able to give any further details concerning the intruders' outfit, such as insignia, or the way they were communicating among themselves, namely whether they were using specific military terms. The use of the APC by the abductors also had not been established with sufficient certainty. In particular, none of the witnesses interviewed by the investigation, apart from the second applicant, submitted that the abductors had been driving a APC and two Gazel vehicles. The first applicant and Kh.M. stated to the investigation that they had learnt about those vehicles from neighbours, whilst the neighbours also stated that they had found out about it from other persons.

79. The Government further submitted that the investigation into the abduction of Khamid Mukayev was effective. It was promptly instituted, was conducted by an independent authority and the relevant investigative steps were taken without delays. The fact that the investigation was suspended on numerous occasions and that the identity of the perpetrators was not established did not render it ineffective either, since the obligation to investigate was not an obligation of result but of means. The investigating authorities interviewed eyewitnesses to the abduction and over forty residents of Katyr-Yurt, inspected the crime scene and took an important number of other relevant investigative steps.

80. The applicants maintained that they had made out a prima facie case that their relative had been detained by State agents and that he must be presumed dead following his unacknowledged detention. The State authorities were interested in arresting Khamid Mukayev to obtain information on his father, who had been a member of illegal armed groups during the first Chechen campaign. They further stressed that the Government did not dispute that their relative had been abducted by a large group of armed men in camouflage uniforms who spoke unaccented Russian and was moving through the village during curfew in a convoy of military vehicles, including an APC. The servicemen stationed in the Chechen Republic often wore uniforms without insignia and, in any event, the applicants were so shocked by the abduction and murder of their relatives that they cannot be blamed for not being able to remember whether the intruders' camouflage uniforms had borne insignia.

81. As regards military vehicles, the applicants stated that the Government had failed to submit any evidence to dispute that the convoy, including an APC, had passed the manned checkpoint at the entry to Katyr-Yurt. Moreover, the crime scene inspection established that there were imprints of APCs near the applicants' house and five witnesses, whose interview records the Government provided to the Court, stated that they had seen military vehicles at the applicants' house at about 4 a.m. on 16 September 2004. That fact was further confirmed by the statements of

witness L.M. and other residents of the village. The applicants further submitted that at the material time Katyr-Yurt was under the exclusive control of the authorities and that their relative's abductors had moved freely through the village and checkpoints during curfew hours.

82. As regards the investigation, the applicants argued that it had not been effective because, despite abundant evidence of the presence of military vehicles during the abduction, the authorities had failed to take measures to establish the ownership of the military vehicles and the identity of the persons under whose responsibility they had been used. Whilst it was clear that Khamid Mukayev had been abducted during curfew, the authorities had failed to interview the military commander of the district and other officials responsible for the curfew. The applicants also stated that by interviewing some thirteen people who lived a long way from the applicants and could not have possibly witnessed the abduction, and collecting identical statements from them, the investigators had tried to feign an effective investigation instead of concentrating on appropriate investigative actions.

B. The Court's assessment

1. Admissibility

83. The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. Further, the Court has already found that the Government's objection concerning the alleged non-exhaustion of domestic remedies should be joined to the merits of the complaint (see paragraph 76 above). The complaint under Article 2 of the Convention must therefore be declared admissible.

2. Merits

(a) The alleged violation of the right to life of Khamid Mukayev

(i) General principles

84. The Court reiterates that, in the light of the importance of the protection afforded by Article 2, it must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Detained persons are in a vulnerable position and the obligation on the authorities to account for the treatment of a detained individual is particularly stringent where that individual dies or disappears thereafter (see, among other authorities, *Orhan v. Turkey*, no. 25656/94, § 326, 18 June 2002, and the authorities cited

therein). Where the events in issue lie wholly or in large part within the exclusive knowledge of the authorities, as in the case of persons under their control in detention, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII, and *Çakıcı v. Turkey* [GC], no. 23657/94, § 85, ECHR 1999-IV).

(ii) *Establishment of the facts*

85. The Court observes that it has developed a number of general principles relating to the establishment of facts in dispute, in particular when faced with allegations of disappearance under Article 2 of the Convention (for a summary of these, see *Bazorkina v. Russia*, no. 69481/01, §§ 103-109, 27 July 2006). The Court also notes that the conduct of the parties when evidence is being obtained has to be taken into account (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25).

86. The applicants alleged that at about 4 a.m. on 16 September 2004 their relative, Khamid Mukayev, had been abducted by servicemen and had then disappeared. They submitted that several persons, as well as the first and second applicants, had witnessed Khamid Mukayev's abduction, and enclosed their statements to support that submission.

87. The Government conceded that Khamid Mukayev had been abducted on 16 September 2004 by unidentified armed camouflaged men. However, they denied that the abductors had been servicemen and that they had used military vehicles, such as APCs, referring to the absence of conclusions from the ongoing investigation.

88. The Court notes that despite its requests for a copy of the investigation file in respect of the abduction of Khamid Mukayev, the Government refused to produce most of the documents from the case file, referring to possible prejudice to the interests of the parties to the domestic proceedings. In so far as they may be understood to rely on Article 161 of the CCP, the Court observes that it has already held that it is insufficient to justify the withholding of key information requested by it (see *Imakayeva v. Russia*, no. 7615/02, § 123, ECHR 2006-XIII (extracts)).

89. In view of this, and bearing in mind the principles referred to above, the Court finds that it can draw inferences from the Government's conduct in respect of the well-foundedness of the applicants' allegations.

90. The Government disputed the applicants' submission that the abductors of their relative had used military vehicles, including an APC. However, the Government's submission appears to be at variance with the witness statements the Government themselves furnished to the Court. In particular, apart from the applicants, a number of witnesses submitted that they had seen a convoy of military vehicles, including an APC and Gazel

and UAZ vehicles, either stationary at the applicants' house or moving around near it at the time of the abduction of Khamid Mukayev (see paragraphs 53, 56, 60 and 62 above). According to copies of the relevant interview records and, contrary to the Government's submission, none of the witnesses stated that he or she had learnt about those vehicles from other persons (see *ibid.*). Moreover, presence of the APC at the applicants' street at the time of the abduction of Khamid Mukayev was confirmed by witness L.M. (see paragraph 61 above). The Court also does not lose sight of the fact that tracks "presumably those of an APC" were found in the applicants' courtyard during the crime scene inspection (see paragraph 52 above). In sum, the Court cannot accept as well-founded the Government's submission concerning military vehicles.

91. Having further regard to the applicants' submissions and statements by witnesses enclosed by them, the Court considers that they presented an overall coherent and convincing picture of Khamid Mukayev's abduction on 16 September 2004 by a large group of armed and camouflaged men, who were travelling in a convoy of military vehicles, including an APC. It observes that the applicants' account remained consistent both throughout the domestic investigation and before this Court (see paragraphs 12-16, 21, 54 and 58 above). Their submissions are confirmed not only by witness statements they furnished to the Court (see paragraphs 18-21 above) but also by witness statements obtained during the domestic investigation and disclosed by the Government (see paragraphs 53, 56 and 60-62 above).

92. The Court further takes note of the fact that the Government did not dispute the applicants' submission that their relative had been abducted during curfew hours and that the abductors have passed freely through the checkpoints situated in the area. Moreover, the existence of the curfew and the fact of the abductors' uninhibited passage through a checkpoint appear to be confirmed by a witness statement furnished by the Government (see paragraph 53 above).

93. In the Court's view, the fact that a large group of armed men in uniforms and masks, driving in a convoy of military vehicles, including an APC, was able to pass freely through checkpoints during curfew hours and to proceed to arrest the applicants' relative in a manner similar to that of State agents strongly supports the applicants' allegation that they were State servicemen and that they were conducting a special operation in Katyr-Yurt on the night of Khamid Mukayev's abduction.

94. The Court notes that in their applications to the authorities the applicants consistently maintained that Khamid Mukayev had been detained by unknown servicemen and requested the investigating authorities to look into that possibility. It further notes that after more than six years the investigation has produced no tangible results.

95. The Court observes that where the applicant makes out a *prima facie* case and the Court is prevented from reaching factual conclusions owing to

a lack of relevant documents, it is for the Government to argue conclusively why the documents in question cannot serve to corroborate the allegations made by the applicant, or to provide a satisfactory and convincing explanation of how the events in question occurred. The burden of proof is thus shifted to the Government and if they fail in their arguments issues will arise under Article 2 and/or Article 3 (see *Toğcu v. Turkey*, no. 27601/95, § 95, 31 May 2005, and *Akkum and Others v. Turkey*, no. 21894/93, § 211, ECHR 2005-II (extracts)).

96. Taking into account the above elements, the Court is satisfied that the applicants have made a prima facie case that their relative was abducted by State servicemen. The Government's statement that the investigation had not found any evidence to support the involvement of servicemen in the kidnapping is insufficient to discharge them from the above-mentioned burden of proof. Drawing inferences from the Government's failure to submit the remaining documents, which were in their exclusive possession, or to provide another plausible explanation for the events in question, the Court finds that Khamid Mukayev was arrested on 16 September 2004 by State servicemen during an unacknowledged security operation.

97. There has been no reliable news of Khamid Mukayev since the date of the kidnapping. His name has not been found in any official detention facility records. Lastly, the Government have not submitted any explanation as to what happened to him after his arrest.

98. Having regard to the previous cases concerning disappearances in Chechnya which have come before it (see, among many others, *Bazorkina*, cited above; *Imakayeva*, cited above; *Luluyev and Others v. Russia*, no. 69480/01, ECHR 2006-VIII (extracts); *Baysayeva v. Russia*, no. 74237/01, 5 April 2007; *Akhmadova and Sadulayeva*, cited above; and *Alikhadzhiyeva v. Russia*, no. 68007/01, 5 July 2007), the Court finds that in the context of the conflict in the Chechen Republic, when a person is detained by unidentified servicemen without any subsequent acknowledgment of the detention, this can be regarded as life-threatening. The absence of Khamid Mukayev or of any news of him for more than six years supports this assumption.

99. Accordingly, the Court finds that the evidence available permits it to establish that Khamid Mukayev must be presumed dead following his unacknowledged detention by State servicemen.

(iii) *The State's compliance with Article 2*

100. Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivation of life to the most careful scrutiny, taking into consideration not only the actions of State agents but

also all the surrounding circumstances (see, among other authorities, *McCann and Others v. the United Kingdom*, 27 September 1995, §§ 146-147 Series A no. 324, and *Avşar v. Turkey*, no. 25657/94, § 391, ECHR 2001-VII (extracts)).

101. The Court has already found it established that the applicants' relative must be presumed dead following his unacknowledged detention by State servicemen. Noting that the authorities do not rely on any ground of justification in respect of any use of lethal force by their agents, it follows that liability for his presumed death is attributable to the respondent Government.

102. Accordingly, the Court finds that there has been a violation of Article 2 in respect of Khamid Mukayev.

(b) The alleged inadequacy of the investigation of the kidnapping

103. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, *McCann and Others*, cited above, § 161, and *Kaya v. Turkey*, 19 February 1998, § 86, *Reports of Judgments and Decisions* 1998-I). The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. This investigation should be independent, accessible to the victim's family and carried out with reasonable promptness and expedition. It should also be effective in the sense that it is capable of leading to a determination of whether or not the force used in such cases was lawful and justified in the circumstances, and should afford a sufficient element of public scrutiny of the investigation or its results (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, §§ 105-109, 4 May 2001, and *Douglas-Williams v. the United Kingdom* (dec.), no. 56413/00, 8 January 2002).

104. The Court notes at the outset that the Government refused to produce most of the documents from case file no. 38041 and furnished only copies of some documents, most of them being barely legible copies of records of interviews with residents of Katyr-Yurt, compiled in almost identical terms (see paragraph 48 above). It therefore has to assess the effectiveness of the investigation on the basis of the very sparse information submitted by the Government and the few documents available to the applicants that they provided to the Court.

105. Turning to the facts of the present case, the Court observes that the applicants notified the authorities of the abduction immediately after it had

occurred. The investigation was opened on 16 September 2004, the day of the abduction. Thus, the Court is satisfied that it was instituted with sufficient promptness.

106. The Court has further to assess the scope of the investigative measures taken. From the documents furnished by the Government it follows that a number of investigative steps, such as crime scene inspection, fingerprint examination and interviewing of some 30 witnesses, were taken in the time span from September to December 2004. Subsequently, in November 2006 further three witnesses were interviewed and in September 2008 several requests for information on Khamid Mukayev's whereabouts and his eventual detention were sent.

107. In the Government's submission, the investigating authorities took an important number of other investigative steps. However, in view of their refusal to provide most of the documents, not only is it impossible for the Court to establish how promptly those measures were taken, but whether they were taken at all.

108. Having regard to the documents at its disposal, the Court notes that it is perplexed by the inexplicable delays of the investigation in taking basic investigative steps. In particular, it is not clear why the investigating authority had to wait for four years before inquiring of various State authorities about the applicants' relative's whereabouts (see paragraph 63 above). Likewise, it remains unclear why it took the investigators more than two years to interview some of the applicants' close neighbours, who might have provided relevant information on the circumstances of the abduction (see paragraphs 60-62, see also paragraph 40 above).

109. Furthermore, it emerges that although the investigating authorities were immediately made aware of the direction in which the abductors had left and the checkpoint through which their vehicles had passed without being stopped (see paragraph 53 above), two years later they had still taken no steps to verify that information, interview the officers who had been on duty at the checkpoint on the night of the abduction or examine the relevant logs (see paragraph 40 above). There is no evidence that those steps were taken at all.

110. It also appears that a further number of crucial investigative steps were never taken. In particular, there is no indication that the investigation attempted to identify the owners of the APC and other vehicles by establishing which military units or other law-enforcement authorities were equipped with them, where those vehicles had been located at the time of the abduction and on whose orders they had been used. It does not appear that any attempts have been made to establish the itinerary of the vehicles, although the witnesses indicated the direction in which they had left. Whilst the applicants' relative was abducted during curfew hours, nothing suggests that any attempts were made to identify and interview persons responsible

for curfew, such as the military commander of the district, and to clarify who had been granted permission to move during those hours.

111. It is obvious that, if they were to produce any meaningful results, these investigative measures should have been taken immediately after the crime was reported to the authorities, and as soon as the investigation commenced. The delays and omissions, for which there has been no explanation in the instant case, not only demonstrate the authorities' failure to act of their own motion but also constitute a breach of the obligation to exercise exemplary diligence and promptness in dealing with such a serious matter (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 94, ECHR 2004-XII).

112. The Court further notes that, although the second applicant was eventually granted victim status in the proceedings in case no. 38041, there is no indication that the issue of granting that status to the first applicant was ever considered, despite the fact that the authorities must have been clearly aware of her kinship with the missing person. It also emerges from the applicants' repeated requests for information addressed to the investigating authorities that they were barely informed of the developments in the investigation. Accordingly, the investigators failed to ensure that the investigation received the required level of public scrutiny, or to safeguard the interests of the next of kin in the proceedings

113. Lastly, the Court notes that the investigation was adjourned and resumed on numerous occasions. It emerges that the decisions to suspend the investigation were taken despite its failure to take the most basic steps (see, for example, paragraph 40 above) and that there were lengthy periods of inactivity on the part of the investigating authorities when no investigative measures were being taken.

114. Having regard to the limb of the Government's preliminary objection that was joined to the merits of the complaint, inasmuch as it concerns the fact that the domestic investigation is still pending, the Court notes that the investigation, having been repeatedly suspended and resumed and plagued by inexplicable delays and omissions, has been pending for many years with no tangible results.

115. Furthermore, the applicants, who had no access to the case file and were not kept properly informed of the progress in the investigation, could not have effectively challenged any acts or omissions of the investigating authorities before a court. The adjourning or reopening of proceedings is not in itself a sign that the proceedings are ineffective. However, as the Court has established above, in the present case the decisions to adjourn were made without the necessary investigative steps being taken, which led to numerous periods of inactivity and thus unnecessary protraction. Moreover, owing to the time that had elapsed since the events complained of, certain investigative measures that ought to have been carried out much earlier

could no longer usefully be conducted. Therefore, it is highly doubtful that the remedy relied on would have had any prospects of success.

116. In the Court's opinion, the Government also failed to demonstrate how the second applicant's victim status could have improved the above-described situation. In particular, even assuming that on 1 November 2006 the investigation was reopened on the second applicant's request and whilst the authority which issued that decision indicated precisely the omissions made by the district prosecutor's office and ordered it to remedy them (see paragraph 40 above), the Court has no evidence that those instructions have ever been complied with. Nonetheless, a month later the investigation was again suspended.

117. In sum, the Court finds that the remedies relied on by the Government were ineffective in the circumstances and dismisses their preliminary objection.

118. In the light of the foregoing, the Court holds that the authorities failed to carry out an effective criminal investigation into the circumstances surrounding the disappearance of Khamid Mukayev, in breach of Article 2 in its procedural aspect.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

119. The applicants relied on Article 3 of the Convention, submitting that as a result of their relative's disappearance and the State's failure to investigate it properly they had endured mental suffering in breach of Article 3 of the Convention. Article 3 reads:

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

A. The parties' submissions

120. The Government disagreed with these allegations and argued that the investigation had not established that the applicants had been subjected to inhuman or degrading treatment prohibited by Article 3 of the Convention.

121. The applicants maintained the complaint.

B. The Court's assessment

1. Admissibility

122. The Court notes that this complaint under Article 3 of the Convention is not manifestly ill-founded within the meaning of

Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. *Merits*

123. The Court has found on many occasions that in a situation of enforced disappearance close relatives of the victim may themselves be victims of treatment in violation of Article 3. The essence of such a violation does not mainly lie in the fact of the “disappearance” of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention (see *Orhan v. Turkey*, no. 25656/94, § 358, 18 June 2002, and *Imakayeva*, cited above, § 164).

124. In the present case the Court notes that the applicants are close relatives of the disappeared person and that they witnessed his abduction. For more than six years they have not had any news of the missing man. During this period the applicants have made enquiries of various official bodies, both in writing and in person, about their missing relative. Despite their attempts, the applicants have never received any plausible explanation or information about what became of him following his detention. The responses received mostly denied State responsibility for their relative's arrest or simply informed them that the investigation was ongoing. The Court's findings under the procedural aspect of Article 2 are also of direct relevance here.

125. The Court therefore concludes that there has been a violation of Article 3 of the Convention in respect of the applicants.

IV. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

126. The applicants further stated that Khamid Mukayev had been detained in violation of the guarantees contained in Article 5 of the Convention, which reads, in so far as relevant:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other

officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

A. The parties' submissions

127. The Government asserted that no evidence had been obtained by the investigators to confirm that Khamid Mukayev had been deprived of his liberty. He was not listed among the persons kept in detention centres and none of the regional law-enforcement agencies had information about his detention.

128. The applicants reiterated the complaint.

B. The Court's assessment

1. Admissibility

129. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that the complaint is not inadmissible on any other grounds and must therefore be declared admissible.

2. Merits

130. The Court has previously noted the fundamental importance of the guarantees contained in Article 5 to secure the right of individuals in a democracy to be free from arbitrary detention. It has also stated that unacknowledged detention is a complete negation of these guarantees and discloses a very grave violation of Article 5 (see *Çiçek v. Turkey*, no. 25704/94, § 164, 27 February 2001, and *Luluyev*, cited above, § 122).

131. The Court has found that Khamid Mukayev was abducted by State servicemen on 16 September 2004 and has not been seen since. His detention was not acknowledged, was not logged in any custody records and there exists no official trace of his subsequent whereabouts or fate. In accordance with the Court's practice, this fact in itself must be considered a most serious failing, since it enables those responsible for an act of deprivation of liberty to conceal their involvement in a crime, to cover their tracks and to escape accountability for the fate of a detainee. Furthermore,

the absence of detention records, noting such matters as the date, time and location of detention and the name of the detainee as well as the reasons for the detention and the name of the person effecting it, must be seen as incompatible with the very purpose of Article 5 of the Convention (see *Orhan*, cited above, § 371).

132. The Court further considers that the authorities should have been more alert to the need for a thorough and prompt investigation of the applicants' complaints that their relative had been detained and taken away in life-threatening circumstances. However, the Court's findings above in relation to Article 2 and, in particular, the conduct of the investigation leave no doubt that the authorities failed to take prompt and effective measures to safeguard him against the risk of disappearance.

133. In view of the foregoing, the Court finds that Khamid Mukayev was held in unacknowledged detention without any of the safeguards contained in Article 5. This constitutes a particularly grave violation of the right to liberty and security enshrined in Article 5 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

134. The applicants complained that they had been deprived of effective remedies in respect of the aforementioned violations, contrary to Article 13 of the Convention, which provides:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

A. The parties' submissions

135. The Government contended that the applicants had effective remedies at their disposal as required by Article 13 of the Convention and that the authorities had not prevented them from using them. The applicants had an opportunity to challenge the acts or omissions of the investigating authorities in court pursuant to Article 125 of the Code of Criminal Procedure and have been able to avail themselves of it. They added that participants in criminal proceedings could also claim damages in civil proceedings and referred to cases where victims in criminal proceedings had been awarded damages from State bodies. In sum, the Government submitted that there had been no violation of Article 13.

136. The applicants reiterated the complaint.

B. The Court's assessment

1. Admissibility

137. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

138. The Court reiterates that in circumstances where, as here, a criminal investigation into the disappearance has been ineffective and the effectiveness of any other remedy that might have existed, including civil remedies suggested by the Government, has consequently been undermined, the State has failed in its obligation under Article 13 of the Convention (see *Khashiyev and Akayeva*, cited above, § 183).

139. Consequently, there has been a violation of Article 13 in conjunction with Article 2 of the Convention.

140. As regards the applicants' reference to Articles 3 and 5 of the Convention, the Court considers that, in the circumstances, no separate issue arises in respect of Article 13, read in conjunction with Articles 3 and 5 of the Convention (see *Kukayev v. Russia*, no. 29361/02, § 119, 15 November 2007, and *Aziyevy v. Russia*, no. 77626/01, § 118, 20 March 2008).

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

141. 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. Pecuniary damage

142. The applicants claimed damages in respect of loss of earnings by their relative after his arrest and subsequent disappearance. The second applicant claimed a total of 3,900 euros (EUR) under this head. The third and fourth applicants claimed EUR 4,726 and EUR 5,092, respectively. The first applicant made no claims under this head.

143. The applicants submitted that at the material time Khamid Mukayev had been employed but that they had been unable to obtain the relevant certificates to confirm it. They suggested that in that case the calculation should be made on the basis of the minimum subsistence level

established by national law (3,898 Russian roubles (RUB) at the material time). They submitted that the third and fourth applicants each should be entitled to 25% of that amount until they reached majority and the second applicant would be entitled to the same percentage as the person with care of both children until they reached the age of majority.

144. The Government submitted that the applicants had failed to substantiate their claims. Moreover, they failed to make use of the domestic remedies providing for a possibility of claiming a compensation for the loss of the family breadwinner.

145. The Court reiterates that there must be a clear causal connection between the damage claimed by the applicants and the violation of the Convention, and that this may, in an appropriate case, include compensation in respect of loss of earnings. The Court further finds that the loss of earnings also applies to the dependent children and that it is reasonable to assume that Khamid Mukayev would eventually have had some earnings from which the second to fourth applicants would have benefited (see, among other authorities, *Imakayeva*, cited above, § 213). Having regard to its above conclusions, it finds that there is a direct causal link between the violation of Article 2 in respect of the second to fourth applicants' relative and their loss of the financial support which he could have provided. Having regard to the applicants' submissions and the fact that there is no evidence that Khamid Mukayev was employed at the time of his abduction, the Court awards the second to fourth applicants jointly EUR 6,000 in respect of pecuniary damage, plus any tax that may be chargeable on that amount.

B. Non-pecuniary damage

146. The applicants claimed non-pecuniary damage for the suffering they had endured as a result of the loss of their family member, the indifference shown by the authorities towards him and the failure to provide any information about the fate of their close relative, leaving the determination of its amount to the Court.

147. The Government submitted that, should the Court find a violation of the Convention, a finding of a violation would constitute sufficient just satisfaction.

148. The Court has found a violation of Articles 2, 5 and 13 of the Convention on account of the unacknowledged detention and disappearance of the applicants' relative. The applicants themselves have been found to have been victims of a violation of Article 3 of the Convention. The Court thus accepts that they have suffered non-pecuniary damage which cannot be compensated for solely by the findings of violations. It awards the first applicant EUR 20,000 and EUR 40,000 jointly to the second to fourth applicants, plus any tax that may be chargeable thereon.

C. Costs and expenses

149. The applicants were represented by Mr D. Itslyayev. They submitted the relevant agreement and an itemised schedule of costs and expenses that included research and interviews, as well as drafting of legal documents submitted to the Court and the domestic authorities at a rate of EUR 150 per hour, as well as administrative expenses, translation and courier delivery fees. The aggregate claim in respect of costs and expenses related to the applicants' representation amounted to EUR 12,225.

150. The Government pointed out that the applicants should be entitled to the reimbursement of their costs and expenses only in so far as it had been shown that they had actually been incurred and were reasonable as to quantum (see *Skorobogatova v. Russia*, no. 33914/02, § 61, 1 December 2005).

151. The Court has to establish first whether the costs and expenses indicated by the applicants' relative were actually incurred and, second, whether they were necessary (see *McCann and Others*, cited above, § 220).

152. Having regard to the details of the information and legal representation contracts submitted by the applicants, the Court is satisfied that these rates are reasonable and reflect the expenses actually incurred by the applicants' representatives.

153. As to whether the costs and expenses incurred for legal representation were necessary, the Court notes that this case was rather complex and required a certain amount of research and preparation. It notes at the same time, that due to the application of former Article 29 § 3 in the present case, the applicants' representatives submitted their observations on admissibility and merits in one set of documents. The Court thus doubts that legal drafting was necessarily time-consuming to the extent claimed by the representatives. Furthermore, the case involved little documentary evidence, in view of the Government's refusal to submit most of the case file. The Court thus doubts that research was necessary to the extent claimed by the representative. Lastly, the Court notes that the applicants did not submit any documents in support of their claim for administrative costs.

154. Having regard to the details of the claims submitted by the applicants, the Court awards them the amount of EUR 7,500, together with any value-added tax that may be chargeable to the applicants, the net award to be paid into the representative's bank account, as identified by the applicants.

D. Default interest

155. The Court considers it appropriate that the default interest 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. *Decides* to join to the merits the Government's objection as to non-exhaustion of criminal domestic remedies and rejects it;
2. *Declares* the application admissible;
3. *Holds* that there has been a substantive violation of Article 2 of the Convention in respect of Khamid Mukayev;
4. *Holds* that there has been a violation of Article 2 of the Convention in respect of the failure to conduct an effective investigation into the circumstances in which Khamid Mukayev disappeared;
5. *Holds* that there has been a violation of Article 3 of the Convention in respect of the applicants on account of their mental and emotional suffering;
6. *Holds* that there has been a violation of Article 5 of the Convention in respect of Khamid Mukayev;
7. *Holds* that there has been a violation of Article 13 of the Convention in respect of the alleged violation of Article 2 of the Convention;
8. *Holds* that no separate issues arise under Article 13 of the Convention in respect of the alleged violations of Articles 3 and 5;
9. *Holds*
 - (a) that the respondent State is to pay, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Russian roubles on the date of settlement, apart from the payment in respect of costs and expenses:
 - (i) EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of pecuniary damage to the second, third and fourth applicants jointly;
 - (ii) EUR 20,000 (twenty thousand euros) to the first applicant and EUR 40,000 (forty thousand euros) to the second, third and fourth applicants jointly, plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (iii) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses, to be paid into the representative's bank account;

(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;

10. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 21 December 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President