



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

FIRST SECTION

CASE OF VITAYEVA AND OTHERS v. RUSSIA

(Application no. 27459/07)

JUDGMENT

STRASBOURG

7 June 2011

FINAL

28/11/2011

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

In the case of Vitayeva and Others v. Russia,

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

Nina Vajić, *President*,
Anatoly Kovler,
Christos Rozakis,
Peer Lorenzen,
Elisabeth Steiner,
Mirjana Lazarova Trajkovska,
Julia Laffranque, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 17 May 2011,

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

PROCEDURE

1. The case originated in an application (no. 27459/07) 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 the three Russian nationals listed below (“the applicants”), on 14 June 2007.

2. The applicants were represented by lawyers of the Stichting Russian Justice Initiative (“SRJI”), an NGO based in the Netherlands with a representative office in Russia. 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 27 August 2009 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. The Government objected to the joint examination of the admissibility and merits of the application. Having considered the Government’s objection, the Court dismissed it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants are:

- (1) Ms Zalina Vitayeva, who was born in 1982;
- (2) Ms Yakhita Kudayeva, who was born in 1959; and
- (3) Mr Murad Kudayev, who was born in 2002.

The applicants live in Grozny. The first applicant is the wife of Magomed-Emi (also known as Magomed-Emin, Magomed or Zema) Kudayev, who was born in 1982; the second applicant is his mother; and the third applicant is his son.

A. Disappearance of Magomed-Emi Kudayev

1. Information submitted by the applicants

(a) Abduction of the applicants' relative

6. At the material time the applicants and Magomed-Emi Kudayev lived in one household at 63-65 Ippodromniy Lane in the Leninskiy district of Grozny. The household consisted of several dwellings around a yard. Magomed-Emi Kudayev and the first and third applicants lived together in one dwelling with a separate entrance. The second applicant and a number of other relatives, including Magomed Kudayev's grandparents, lived in the other dwellings. Magomed Kudayev was a fourth year student at the Grozny Oil Institute. He worked as an unarmed security guard for a private company. At the material time the area was under curfew.

7. On the evening of 27 March 2004 the applicants, their relatives and Magomed-Emi Kudayev were at home. At about 11.45 p.m. the first applicant heard a noise and looked out of the window. She saw a group of about ten armed masked men. The men were fairly short and were wearing camouflage-coloured jackets and black trousers as well as green camouflage outfits. The applicant thought that they were military servicemen. One of them was not particularly tall and was of a rather heavy build. He spoke unaccented Russian and was wearing a camouflage jacket and camouflage trousers. The applicants thought that this man was Russian, whereas the rest of the intruders were Chechens as they spoke Russian with an accent.

8. Having woken up her husband, the first applicant went to the door. One of the men asked her: "Where is Zelimkhan?" Magomed Kudayev answered that it was he. Then a man ordered him in accented Russian to get dressed and follow them. The men did not ask for any documents. When the

first applicant asked where they were taking her husband, one of the intruders pointed his gun at her and ordered her to go into another room. Meanwhile the second applicant, who had been alerted by the noise, entered the room. Some of the men entered the dwelling of Magomed Kudayev's grandparents. When Magomed Kudayev's grandfather asked the intruders what they were looking for, one of them answered in Chechen that they would find what they were looking for.

9. The second applicant kept asking the men about the reasons for her son's arrest, but she did not receive any explanation. The Russian man ordered the others to hurry up and take Magomed Kudayev away. Next, the men put Magomed Kudayev's hands behind his back and took him outside, where they grabbed Magomed Kudayev and quickly carried him from the yard to two UAZ vehicles parked in the street. Both vehicles had tinted windows; one of them had an antenna and the other one was a minivan ("Таблетка").

10. The second applicant attempted to follow the intruders and threw a rock at them. In response they opened fire with their guns. Magomed Kudayev asked them not to shoot at the household premises. The men quickly placed Magomed Kudayev in the minivan and drove away.

11. Immediately after the abduction, alarmed by the shooting, a number of neighbours gathered at the applicants' house. One of the applicants' acquaintances, who worked at the Leninskiy district department of the interior ("the ROVD"), immediately drove to the ROVD to bring an investigator over.

12. About 20 minutes after the abduction, officers from the Leninskiy ROVD arrived at the scene. The applicants described the intruders' vehicles, and one of the police officers told them that he had overheard on the police radio that two cars matching their description had passed through the checkpoint located on the road to Khankala and that the cars had ignored the soldiers' attempts to stop them.

(b) Subsequent events

13. On the following day, 28 March 2004, an investigator from the Leninskiy ROVD took statements from the applicants, their relatives and neighbours. The crime scene was examined and a few spent bullet cartridges were collected as evidence. According to the applicants, the investigator told them that servicemen from the "*Vostok*" (East) battalion, a military unit staffed by Chechens under the command of Mr S. Ya., had most probably been involved in the abduction.

14. About five or six days after the abduction, a young man visited the first applicant and asked whether she was Zalina, the wife of Zema. After the applicant confirmed that, he told her that he worked at the base of the *Vostok* battalion in Vedenno, Chechnya, that Magomed Kudayev had been

taken to the base, and that she should contact its commander, Mr S. Ya. in Gudermes, Chechnya, before her husband was killed.

15. The applicants and their family members went to Gudermes twice to have a meeting with Mr S. Ya. but the base's guards did not allow them to see him.

16. About three weeks after the abduction, Magomed Kudayev's uncle was approached by a Mr A.G., who told him that his nephew, Mr Ya. Ge., had been abducted on 6 April 2004, that his nephew had been detained in the same place as Magomed Kudayev for about eight days, and that both detainees had had sacks pulled over their heads and had been handcuffed. Sometimes the sacks had been removed and the detainees had been able to see each other. They had been detained in a pit-like basement in a bathhouse. The building had had electricity and natural light had penetrated through cracks in the walls. The detainees had been fed. They had heard dogs barking and the noise of helicopters, gunfire and calls for prayer, which they had thought were coming from a mosque situated nearby. Several days later Mr Ya. Ge. had been released with the assistance of Mr A.G.'s brother, Mr Kh. G. During his release Mr Ya. Ge. had noticed two domes located not far away from the detention place.

17. The applicants asked Mr A.G. to assist them in the release of Magomed Kudayev. Mr A.G. promised that he would speak to his brother, Mr Kh. G., about that. For three months the applicants and their relatives waited for any information about Magomed Kudayev. Then Mr A.G. told them that his brother could not establish Magomed Kudayev's whereabouts.

18. In November 2004 the first applicant met Mr Ya. Ge., who at the time was working in the *Vostok* battalion. According to him, Magomed Kudayev was probably still in detention at the battalion's base in Vedenov.

19. According to another man, Mr R., who used to work in the *Vostok* battalion in Vedenov, Magomed Kudayev had been detained there for seven months and after that he had been transferred elsewhere.

20. In 2005 the applicants' relative spoke to Mr V.P., the head of the criminal search division of the Chechnya Ministry of the Interior ("the MVD"), who confirmed that a group of investigators had visited the pit in Vedenov and had confirmed that Magomed Kudayev had been detained there.

21. In support of their statements the applicants submitted the following documents: a statement by the first applicant, dated 15 February 2006; a statement by the second applicant, dated 21 August 2006; a statement by the applicants' neighbour Ms L.D., dated 1 October 2006; a statement by the applicants' neighbour Ms R.M., dated 12 November 2006; a statement by Mr A.G., dated 24 November 2006; a statement by the applicants' neighbour Mr Kh. M., dated 24 November 2006; and four hand-drawn maps of the applicants' household and its premises.

2. Information submitted by the Government

22. The Government did not challenge the facts as presented by the applicants.

B. The search for Magomed-Emi Kudayev and the investigation

1. Information submitted by the applicants

23. On 28 March 2004 the applicants reported Magomed Kudayev's abduction to a number of local law-enforcement authorities, including the ROVD.

24. On 8 April 2004 the Chechnya military commander's office forwarded the applicants' report of the abduction to the Leninskiy district military commander's office of Grozny ("the district military commander's office") for examination.

25. On 13 April 2004 (in the documents submitted the date was also referred to as 27 March 2004 and 14 June 2004) the Leninskiy district prosecutor's office ("the district prosecutor's office") instituted a criminal investigation into the abduction of Magomed Kudayev under Article 126 § 2 of the Criminal Code (aggravated kidnapping). The case file was given number 30028 (in the documents submitted it was also referred to under the numbers 30024 and 20130).

26. On 30 April 2004 the investigators granted the second applicant victim status in the criminal case.

27. On 13 May 2004 the Chechnya prosecutor's office informed the applicants that the district prosecutor's office had instituted an investigation into the abduction and that operational-search measures were underway.

28. On 25 May 2004 the Chechnya MVD informed the applicants that they had collected information concerning the abduction and that this information had been forwarded to the district prosecutor's office.

29. On 20 or 22 December 2004 the first applicant reported her husband's abduction to the Chechnya military commander. She described its circumstances and stated that four days after the events in question she had met a man who had told her that Magomed Kudayev had been detained in Vedenovskaya and that she was supposed to ask the commander of the *Vostok* battalion, Mr S. Ya., in Gudermes for his release. She further stated that three weeks later she had spoken with a man who had told her that his relative, a young man, was detained for eight days with Magomed Kudayev in a half-ruined old bathhouse building. He further told her that the detainees had heard dogs barking and the noise of helicopters, calls for prayers, conversations between the guards and had also heard their nicknames, such as "*Bandit*" (Bandit), who had been a tall man, "*Tigr*" (Tiger), "*Beliy*" (White) and "*Tikhiy*" (Quiet). The applicant pointed out that

this young man had been released with the assistance of Mr Kh. G., who lived in the Shelkovskoy district of Chechnya.

30. On 24 December 2004 the district prosecutor's office informed the applicants that even though their investigative measures had failed to establish the whereabouts of Magomed Kudayev, operational-search measures were underway.

31. On 25 December 2004 and then on 21 February 2005 the Chechnya military commander forwarded the first applicant's requests for assistance in the search for her husband to the district military commander's office.

32. On 18 March 2005 the district prosecutor's office informed the applicants that they had examined a previous complaint by them of 15 March 2005 and that they had instructed the ROVD "to identify the woman named Tamila and to arrest her".

33. On 27 May 2005 the military prosecutor of the United Group Alignment ("the military prosecutor of the UGA") forwarded the second applicant's request for assistance in the search for her son to the military prosecutor's office of military unit no. 20102.

34. On 3 August 2005 the military prosecutor's office of military unit no. 20102 informed the applicants that the investigation into the abduction of Magomed Kudayev had been suspended and that the investigators had not established the involvement of military servicemen in the crime.

35. On 27 September 2005 the military prosecutor of the UGA again informed the applicants that the investigation had not established the involvement of military servicemen in the abduction of their relative and that the investigation of the criminal case had been suspended.

36. On 12 and 14 October 2005 the investigators informed the applicants that the investigation of the criminal case had been suspended on 8 March 2005 for failure to identify the perpetrators.

37. On 13 October 2005 the Chechnya prosecutor's office forwarded the applicants' report of the abduction to the district prosecutor's office for examination.

38. On 28 November 2005 the Chechnya department of the Federal Security Service ("the Chechnya FSB") informed the applicants that they had not detained Magomed Kudayev and had no information concerning his whereabouts.

39. On 7 December 2005 and again on 1 February 2006 the criminal search division of the temporary operational group of the Ministry of the Interior in Khankala, Chechnya, informed the applicants that they had no information concerning the arrest and detention of Magomed Kudayev by law-enforcement agencies in Chechnya and that they had forwarded the applicants' request for assistance in the search for Magomed Kudayev to the Chechnya MVD.

40. On 27 December 2005 and again on 16 January 2006 the department of military counterintelligence of the FSB informed the applicants that they

had no information concerning the whereabouts of Magomed Kudayev and that the security forces of the North Caucasus were taking measures to establish his whereabouts.

41. On 23 June 2006 the Chechnya MVD informed the applicants that they had forwarded their request for assistance in the search for Magomed Kudayev to the ROVD.

42. On 27 February 2007 the Chechnya prosecutor's office informed the applicants that: they had failed to establish the whereabouts of Magomed Kudayev; on 6 January 2006 the investigation of the criminal case had been suspended for failure to identify the perpetrators; on 24 February 2007 the investigation had been resumed; and that the Chechnya prosecutor's office had ordered the investigators to take a number of investigative steps.

43. On 2 April 2007 the investigators informed the applicants that on the same date they had suspended the investigation of the criminal case for failure to identify the perpetrators.

44. On 25 August 2007 the Chechnya prosecutor's office informed the applicants that the investigation of the criminal case had been resumed on 20 July 2007 upon the order of the supervising prosecutor.

45. On 20 August 2007 the investigation of the criminal case was suspended for failure to establish the identities of the perpetrators. The applicants appealed against this decision (see paragraph 105 below).

46. On 15 July 2008 the Chechnya MVD informed the applicants that they were taking operational-search measures to establish Magomed Kudayev's whereabouts.

47. On 1 November 2008 the Chief Military Prosecutor's office informed the applicants that they had forwarded their complaint of 21 October 2008 to the military prosecutor's office of the UGA.

48. On 9 November 2008 the Prosecutor General's office informed the applicants that they had forwarded their complaint to the Chechnya prosecutor's office.

49. On 4 June 2009 the Main Information Centre of the Russian Ministry of the Interior ("the Russian MVD") informed the applicants that they had no information concerning Magomed Kudayev.

50. On 16 June 2009 the Envoy on Human Rights and Freedoms in Chechnya complained on the applicants' behalf to the district prosecutor's office about the lack of information concerning the criminal investigation. No reply was given to this complaint.

51. The applicants did not receive any further information concerning the official investigation of their relative's abduction.

2. Information submitted by the Government

52. On 29 March 2004 investigators from the district prosecutor's office examined the crime scene at the applicants' household. One bullet and five spent cartridges were collected from the scene.

53. On 13 April 2004 (in the documents submitted the date was also referred to as 13 April 2002) the district prosecutor's office opened a criminal case in connection with Magomed Kudayev's abduction. According to the text of the decision, the investigators received the information about the abduction from the ROVD on 29 March 2004.

54. On 13 April 2004 the investigators ordered an expert ballistics evaluation of the evidence collected from the crime scene.

55. On 8 May 2004 the forensic assessment office provided the investigators with its report concerning the results of the expert evaluation. According to its conclusion, the bullet and the cartridges could have been fired from industrially produced AK-47 machine guns.

56. On 19 April 2004 the investigators questioned the applicants' neighbours, Mr Kh. M. and Ms M. Kh. Both of them stated that at about 11.40 p.m. on 27 March 2004 they had heard screaming coming from the applicants' household. The witnesses had gone out to the street. There they had found out that unidentified armed men in camouflage uniforms and masks had opened fire and had taken away Magomed Kudayev.

57. On 19 April 2004 the investigators questioned the applicants' neighbour, Mr R. Kh., who stated that at about 11.30 p.m. on 27 April 2004 he had heard screaming coming from the applicants' household. He had gone outside, where had found out that unidentified armed men in camouflage uniforms and masks had opened fire and had abducted Magomed Kudayev. The abductors had arrived in two UAZ vehicles, one of which had been a minivan.

58. On 24 April 2004 the investigators granted victim status to Ms Z. Kh., the grandmother of Magomed Kudayev, and questioned her. She stated that the abductors, who had been armed and who had been dressed in camouflage and black uniforms, had arrived at the house in two UAZ vehicles, one of which had been a minivan. They had spoken unaccented Chechen and Russian. The abductors had said that they had been looking for Zelimkhan. When Magomed had told them that was him, they had not asked for identity documents and had simply taken him outside. The first and second applicants had asked the abductors not to take their relative away. But the men had ignored their pleading and the women had then started throwing rocks at them. In response the abductors had opened fire and had gone away, taking Magomed Kudayev with them.

59. On 30 April 2004 the investigators granted the second applicant victim status in the criminal case and questioned her about the circumstances of the abduction. The second applicant's statement concerning the events was similar to the one given by Ms Z. Kh.

60. On 30 April 2004 the investigators granted the first applicant victim status in the criminal case and questioned her about the circumstances of the abduction. She stated that at about 11.45 p.m. on 27 April 2004 she and her family members had been at home when a group of about nine or ten men in

camouflage, black uniforms and masks had come into their courtyard. The group had arrived in two UAZ vehicles, one of which had been a minivan. The intruders had been armed with machine guns and at least one of them had spoken Chechen. The men had asked about Zelimkhan and Magomed had confirmed that was him. Then the men had taken him outside. They had neither searched the house nor asked for identity documents. The first and second applicants had begged the men not to take Magomed-Emi away but the abductors had ignored their pleadings. Then the first applicant had started throwing rocks at them. In response the abductors had opened fire and had left.

61. On various dates in the spring 2004 the investigators sent a number of queries to various district prosecutors' offices and departments of the interior in Chechnya, asking them to provide information concerning the whereabouts of Magomed-Emin Kudayev or discovery of his corpse.

62. On 5 June 2004 the investigators questioned Magomed Kudayev's classmates, Mr O.S. and Mr G.G., both of whom provided positive character references for him.

63. On 13 June 2004 the investigation of the criminal case was suspended for failure to identify the perpetrators.

64. On 31 January 2005 the supervising prosecutor overruled the decision to suspend the investigation as premature and unfounded. The prosecutor's decision criticised the deficiencies in the investigation and pointed out the following:

"... the investigators failed to question Mr R. Kh., Mr Kh. Kh., Ms M. Kh. and Mr Kh. M., all of whom had witnessed the crime. Besides [that], a number of other people who had witnessed the events and could describe the abductors' vehicles had not been questioned either. Registration numbers of the abductors' vehicles had not been identified... other investigative steps had not been taken..."

65. On 8 February 2005 the investigation of the criminal case was resumed.

66. On 15 February 2005 the investigators again questioned Ms Z. Kh., who stated that about eight months prior to being questioned – that is, in June or July 2004 – a young man had arrived at the applicants' house. He had informed the applicants that he had been detained with Magomed Kudayev for about two weeks in Vedenov, in a place resembling an abandoned bathhouse. According to the man, at first Magomed Kudayev had been tortured with electricity, but the abductors had subsequently changed their attitude and had treated the applicants' relative better.

67. On 17 February 2005 the investigators questioned the head of the traffic police division of the Leninskiy ROVD, officer S. Kh., who stated that in the spring of 2002 Magomed Kudayev had been their trainee for three months. According to the witness, Magomed Kudayev had made a negative impression by violating the code of discipline and arguing with his superiors.

68. On 22 February 2005 the investigators questioned the applicants' neighbour, Mr Kh. Mu. He stated that on the night of the abduction he had heard cars driving by in the street and had then heard gunfire. He had gone outside and had seen two UAZ vehicles driving away in the direction of the city centre. He and his neighbours, Mr R. and Mr A., had gone to the Grozny traffic police department and to the special task force group of the Chechnya Ministry of the Interior ("the OMON"). Both bureaus informed them that the vehicles had not driven into their premises. The witness and his neighbours had not been able to obtain any information concerning Magomed Kudayev's whereabouts.

69. On 3 March 2005 the investigators again questioned the second applicant. She stated that about eight months prior to being questioned, in the summer of 2004, a young man named Mr Ya. Ge., who had been around twenty years old, had arrived at her house and had told her that he had been detained with Magomed Kudayev for eight days. The detention place had reminded him of an abandoned bathhouse and had been located in Vedenov. At the beginning of his detention, the guards had tortured Magomed Kudayev with electricity and had beaten him. They had asked Magomed Kudayev about members of illegal armed groups ('*ваххабиты*') and ammunition. According to Mr Ya. Ge., he had been abducted and had been detained by servicemen from the *Vostok* battalion, and he had been released with the assistance of Mr Kh. Ge., who had served in the battalion and whose call sign had been "*Uragan*" (Storm).

70. On 8 March 2005 the investigators suspended the investigation of the criminal case for failure to identify the perpetrators.

71. On 6 December 2005 the supervising prosecutor overruled the decision to suspend the investigation as premature, unsubstantiated and unlawful. The prosecutor pointed out a number of the investigators' failures including the following:

“...Ms Z.G., who had witnessed the abduction, was not questioned by the investigators;

Magomed Kudayev's mother-in-law was not questioned about the circumstances of the visit of the young man who had been detained with Magomed Kudayev;

The investigation file contains information concerning the abduction of Magomed Kudayev by servicemen of the *Vostok* battalion. However, the investigators did not take any measures to verify this information;

The investigation file does not contain the results of the comparative ballistics expert's evaluation of the bullet and the cartridges collected from the crime scene...”

72. On 6 December 2005 (in the documents submitted the date was also referred to as 24 December 2005) the investigation of the criminal case was resumed.

73. On an unspecified date in January 2006 the investigators questioned the applicants' relative, Ms R.V. She stated that in April 2004 a woman had approached her on the street, had told her that her son had been detained with Magomed Kudayev for five days in the same basement in Vedenov and had gone on to state that her son had been released afterwards and taken to Gudermes. The woman had asked Ms R.V. not to tell anyone about the conversation as her son could be killed for sharing such information.

74. On 24 January 2006 (in the documents submitted the date was also referred to as 6 January 2006) the investigators again suspended the investigation of the criminal case for failure to identify the perpetrators.

75. On 24 February 2007 the supervising prosecutor overruled the decision to suspend the investigation as premature, unsubstantiated and unlawful and ordered that it be resumed. The prosecutor again pointed out a number of the investigators' failures including the following:

“...it is necessary to carry out the prosecutor's orders given on 6 December 2005; to take steps to verify the applicants' theory of the involvement of servicemen of the *Vostok* battalion stationed in Vedenov ... in the abduction of Magomed Kudayev; ... [and] to question Mr Ya. Ge., whose statement could play a significant role in the investigation...”

76. On 5 March 2007 the investigators requested that military unit no. 44822 inform them whether the *Vostok* battalion was stationed in Vedenov and, if so, what its address was.

77. On 6 March 2007 the investigators again questioned the second applicant. She stated that about a month after Magomed Kudayev's abduction a man had arrived at her house. He had introduced himself as the uncle of Mr Ya. Ge. and had told her that his nephew Mr Ya. Ge. had been detained with Magomed Kudayev in an abandoned bathhouse. Both detainees had been subjected to beatings and had been tortured with electricity. Two months after the meeting (at the beginning of the summer of 2004), the applicant managed to personally speak with Mr Ya. Ge., who had told her that when he had been taken to the detention place Magomed Kudayev had been already there. The two men had been detained in an abandoned bathhouse for about a week or so. He and Magomed Kudayev had been subjected to beatings and to torture, and they had been handcuffed and blindfolded all the time. Their abductors had demanded that the men confess to membership in illegal armed groups. Mr Ya. Ge. had stated that both he and Magomed Kudayev had been abducted by servicemen from the *Vostok* battalion stationed in the Vedenov area. Sometime later, towards the end of November 2004, a female relative of the applicants met Mr Ya. Ge. He had told her that in August 2004 several young men had been abducted by the battalion's servicemen but that one of them had been eventually released and had told him that in August 2004 he had been detained in the same detention cell as Magomed Kudayev in Vedenov.

78. On 12 March 2007 the investigators questioned Mr Ya.Ge., who stated that in April 2004 he had been abducted from his house by unidentified men who had arrived in an UAZ vehicle. The abductors had put a mask over his head, had put him into the car, had driven for about an hour and a half and had arrived at “a base”. The witness had been taken to an abandoned bathhouse in the Veden district and had been handcuffed to a metal bar in a room measuring three by four square metres. Two days later he had been taken to another room in the basement, where he had been detained for four days with a young man named Magomed. During the detention both men had been handcuffed to pillars inside the room. Magomed had told the witness about his family in Grozny and that he had been a student at the Oil Institute. The abductors, who had been wearing masks, had beaten both detainees with bludgeons, rifle butts and tortured them with electricity. One of the abductors had had the call sign “*Beliy*” and he had been from Shali, Chechnya. During the beatings the abductors had questioned both detainees about members of illegal armed groups and about ammunition. After four days in detention the witness had been released. The abductors had threatened to kill him if he told anyone about the detention. Mr Ya. Ge. had not seen Magomed ever since.

79. On the same date Mr Ya. Ge. identified Magomed-Emi Kudayev from a photograph as the man with whom he had been detained in the Veden district in the spring of 2004.

80. On 13 March 2007 the investigators informed the second applicant about the results of the ballistics expert’s evaluation of the evidence carried out in the spring of 2004.

81. On 14 March 2007 the investigators again questioned the first applicant, who stated that in the summer of 2004 she and the second applicant had gone to Grebenskaya, Chechnya, to meet with Mr Ya. Ge. He had told them that he had been detained with Magomed Kudayev for about six days in an abandoned bathhouse; that their abductors’ call signs had been *Beliy*, *Tikhiy*, *Tigr* and *Bandit*; and that he had been released but Magomed had remained in detention.

82. On 15 March 2007 the investigators requested that Operational-Search Bureau no. 2 of the Ministry of the Interior in the Southern Federal Circuit (*ОПС-2 ГВ МБД ПФ по ЮФО*) (“ORB-2”) identify and summon for questioning the “former serviceman of the *Vostok* battalion with the call sign *Beliy* and residence in Shali”.

83. On an unspecified date in March 2007 ORB-2 replied to the investigators that they were taking measures to identify the serviceman with the call sign *Beliy*.

84. On 27 March 2007 the investigators questioned district police officer L.D., who stated that Magomed Kudayev had been abducted at about 4 a.m. on 28 March 2004 by unidentified men who had arrived in UAZ vehicles and who had spoken unaccented Chechen.

85. On 1 April 2007 the investigators refused to open a criminal case against Ms “Tamila” because they had failed to identify her. The text of the decision included the following:

“... a woman who had introduced herself as Tamila had told Ms Ya. Kudayeva [the second applicant] that she had been working at the Chechnya FSB and had then taken USD 5,000 from the applicant [to secure] the release of Magomed Kudayev. She had told the applicant that she would bring her son over in three days. ... the investigation was neither able to identify Tamila nor [ascertain whether] the unlawful acquisition of the applicant’s money by her [had taken place]...”

86. On 2 April 2007 the investigators again suspended the investigation of the criminal case for failure to identify the perpetrators.

87. On 1 May 2007 the Vedenovskiy district department of the FSB informed the investigators that despite their operational-search measures the whereabouts of the former serviceman of the *Vostok* battalion with the call sign *Beliy* could not be established.

88. On 20 July 2007 the supervising prosecutor overruled the decision to suspend the investigation, doing so on the basis of numerous “serious shortcomings” in the proceedings. The text of the decision included the following:

“... the investigators should take the following steps:

- making a plan of the investigative steps to be taken;
- carrying out in full the orders given by the supervising prosecutor on 24 February 2007...;
- request that the ROVD identify the witnesses to the abduction from the residents of the nearby houses and organisations... question [the applicants’] neighbours... take measures to identify the perpetrators and establish Magomed Kudayev’s whereabouts;
- forward requests to district prosecutors’ offices in Chechnya to find out whether they opened criminal cases in connection with the discovery of a corpse with features similar to those of Magomed Kudayev;
- take other investigative measures ... in order to take a lawful and substantiated decision in [respect of] the criminal case...”

89. On 20 July 2007 (in the documents submitted the date was also referred to as 6 August 2007) the investigation in the criminal case was resumed and the applicants were informed about it.

90. On 20 August 2007 the investigation in the criminal case was again suspended for failure to identify the perpetrators. The applicants appealed the suspension of the proceedings to the local court (see paragraphs 104 and 105 below).

91. On 7 June 2008 the supervising prosecutor overruled the decision to suspend the investigation as “unlawful and premature” and ordered that the proceedings be resumed. The text of the decision included the following:

“...it is necessary for the investigation to question the relatives of Mr Ya. Ge. about the circumstances of his abduction, detention and subsequent release... to eliminate contradictions in the information concerning the time of Magomed Kudayev’s abduction ... to request information concerning the abduction or detention of Mr Ya. Ge. from law-enforcement agencies in the Vedeno district ... to check whether federal and local databases of missing persons contain any information concerning Magomed Kudayev ... to take more active steps in order to identify the perpetrators of the abduction and verify whether servicemen of the *Vostok* battalion stationed in Vedeno were involved in the crime...”

92. On 7 June 2008 the investigation in the criminal case was resumed.

93. On 30 June 2008 the investigators forwarded a number of requests to various law-enforcement agencies in Chechnya, asking them to provide information concerning any possible detention of Magomed Kudayev on their premises, discovery of his corpse or any criminal proceedings pending against him.

94. On 7 July 2008 the investigation in the criminal case was again suspended for failure to identify the perpetrators.

95. On 9 December 2008 the supervising prosecutor again overruled the decision to suspend the investigation as “unlawful and premature” and ordered that the proceedings be resumed. The text of the decision stated that the investigators had failed to carry-out in full the orders given to them by the supervising prosecutor on 20 November 2008.

96. On the same date the investigation in the criminal case was resumed.

97. On 11 and 20 December 2008 the investigators requested that the ROVD assist them in carrying out the supervising prosecutors’ orders.

98. On 8 January 2009 the investigation in the criminal case was again suspended for failure to identify the perpetrators.

99. On 29 October 2009 the investigation was resumed until 29 November 2009. The investigators prepared a list of steps to be taken in order to solve the crime.

100. According to the Government, the investigation has failed to establish the whereabouts of Magomed-Emi Kudayev or to identify the perpetrators of his abduction. The law-enforcement agencies of Chechnya never arrested or detained Magomed-Emi Kudayev on criminal or administrative charges and did not carry out a criminal investigation in his respect. No special operations were carried out in respect of the applicants’ relative.

101. According to the documents submitted by the Government, the investigation was suspended and resumed on seven occasions. The supervising prosecutors had criticised the investigation’s deficiencies and had ordered a number of important steps to be taken without delay.

102. According to the Government, the applicants had been duly informed of all decisions taken during the investigation.

103. Despite a specific request by the Court, the Government did not disclose the full contents of criminal case file no. 30028, providing only “a part” of the documents amounting to 170 pages. The Government did not specify the reasons for their failure to provide the remaining documents.

C. Proceedings against the investigators

104. On an unspecified date in March or April 2008 the second applicant complained of the ineffectiveness of the investigation of criminal case no. 30028 to the Leninskiy District Court in Grozny (“the District Court”). She stated that the investigators had suspended the investigation on 20 August 2007 without having taken a number of necessary investigative measures and requested that the investigation be resumed.

105. On 25 April 2008 the District Court allowed the applicant’s complaint in full.

II. RELEVANT DOMESTIC LAW

106. 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

107. The Government contended that the application should be declared inadmissible for non-exhaustion of domestic remedies. They submitted that the investigation of Magomed-Emi Kudayev’s abduction had not yet been completed. The Government further argued that it had been open to the applicants to challenge in court any acts or omissions of the investigators and to pursue civil remedies but that they had failed to do so.

108. The applicants contested that objection. They stated that the criminal investigation had proved to be ineffective and that their complaints to that effect, including their complaint to the district court, had been futile.

B. The Court's assessment

109. 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).

110. 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.

111. As regards a civil action to obtain redress for damage sustained through the alleged illegal acts or unlawful conduct of 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.

112. As regards criminal law remedies, the Court observes that the applicants complained to the law enforcement authorities shortly after the abduction of Magomed-Emi Kudayev and that an investigation has been pending since 13 April 2004. The applicants and the Government dispute the effectiveness of the investigation.

113. 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. THE COURT'S ASSESSMENT OF THE EVIDENCE AND THE ESTABLISHMENT OF THE FACTS

A. The parties' arguments

114. The applicants maintained that it had been shown beyond reasonable doubt that the men who had abducted Magomed-Emi Kudayev had been State agents. In support of their complaint they referred to the fact that the documents from the investigation file partially submitted by the Government fully corroborated their allegation that the abduction and subsequent detention of Magomed-Emin Kudayev had been perpetrated by servicemen of the *Vostok* battalion stationed in the Veden district. The applicants pointed out that their allegations were further confirmed by the

fact that the abductors had been able to move about freely during curfew hours and that their vehicles had not been stopped at the military checkpoints located on the roads leading to and from the area. The applicants also stressed that the Government's refusal to furnish the Court with all the documents from the investigation file demonstrated that it must have contained other evidence proving their allegations. The applicants further submitted that since their relative had been missing for a very lengthy period, he could be presumed dead.

115. The Government submitted that unidentified armed men had abducted Magomed-Emi Kudayev. They contended that the investigation of the incident was pending, that there was no evidence that the abductors had been State agents and that there were therefore no grounds for holding the State liable for the alleged violations of the applicants' rights. They argued that there was no convincing evidence that the applicants' relative was dead. The Government further stated that the applicants' description of the abductors had not been sufficiently precise and that uniforms, firearms and vehicles similar to those of the abductors could have been easily obtained by any criminals.

B. The Court's evaluation of the facts

116. The Court observes that in its extensive jurisprudence 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).

117. The Court notes that despite its requests for a copy of the investigation file regarding the abduction of Magomed-Emi Kudayev, the Government produced only some of the documents from the file without providing any explanation as to their failure to submit the file in full.

118. 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-founded nature of the applicants' allegations. The Court will thus proceed to examine crucial elements in the present case that should be taken into account when deciding whether the applicants' relative can be presumed dead and whether his death can be attributed to the authorities.

119. The applicants alleged that the people who had abducted Magomed-Emi Kudayev on 27 March 2004 and had then killed him had been State agents. The Government did not dispute any of the factual elements underlying the application.

120. The Court notes that the applicants' allegation is supported by the witness statements collected by the applicants and by the domestic investigation. It finds the fact that a large group of armed men in uniform abducted the applicants' relative at his home, opened fire during curfew hours and was then able to pass through military checkpoints strongly supports the allegation that these were State servicemen conducting a security operation. In their statements to the authorities the applicants consistently maintained that Magomed-Emi Kudayev had been detained by State servicemen and requested that the investigation look into that possibility (see paragraphs 69 and 77 above). The domestic investigation also accepted the factual submissions as presented by the applicants and took some steps to check whether State servicemen were involved in the abduction (see paragraphs 71, 75, 82 and 91 above), but it does not appear that any serious steps were taken in that direction.

121. The Court observes that where the applicants make 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 applicants, 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)).

122. 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 investigators had not found any evidence to support the involvement of the State agents in the abduction is insufficient to discharge them from the above-mentioned burden of proof. Having examined the documents submitted by the parties, and 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 Magomed-Emi Kudayev was arrested on 27 March 2004 by State servicemen during an unacknowledged security operation.

123. There has been no reliable news of Magomed-Emi Kudayev since the date of the abduction. His name has not been found in any official detention facility records. Finally, the Government have not submitted any explanation as to what happened to him after his arrest.

124. Having regard to the previous cases concerning disappearances in Chechnya which have come before it (see, among others, *Bazorkina*, cited above; *Imakayeva*, no. 7615/02, ECHR 2006 XIII (extracts); *Luluyev and Others v. Russia*, no. 69480/01, ECHR 2006-XIII (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 Magomed-Emi Kudayev or of any news of him for several years supports this assumption.

125. Accordingly, the Court finds that the evidence available permits it to establish that Magomed-Emi Kudayev must be presumed dead following his unacknowledged detention by State servicemen.

III. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

126. The applicants complained under Article 2 of the Convention that their relative had been deprived of his life by State 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. The parties’ submissions

127. The Government contended that the domestic investigation had obtained no evidence to the effect that Magomed-Emi Kudayev was dead or that any State servicemen had been involved in his abduction or alleged killing. The Government claimed that the investigation of the abduction met the Convention requirement of effectiveness, as all measures available under national law were being taken to solve the crime. The Government also noted that the numerous decisions to suspend and resume the proceedings did not demonstrate their ineffectiveness, but showed that the authorities in charge had continued to take steps to identify the culprits.

128. The applicants argued that Magomed-Emi Kudayev had been detained by State servicemen and should be presumed dead in the absence of any reliable news of him for six years. They also argued that the

investigation had not met the requirements of effectiveness and adequacy laid down by the Court's case-law. The applicants pointed out that the prosecutor's office had not taken some crucial investigative steps, such as questioning key witnesses and gathering other important evidence. The investigation had been opened more than two weeks after the events and it had subsequently been suspended and resumed on several occasions without even the most important steps having been taken. The applicants and their relatives had not been properly informed of the progress of the proceedings. The fact that the investigation had been pending for such a long period of time without producing any tangible results was further proof of its ineffectiveness. The applicants also invited the Court to draw conclusions from the Government's unjustified failure to submit the documents from the case file to them or to the Court.

B. The Court's assessment

1. Admissibility

129. 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 113 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 Magomed-Emi Kudayev

130. The Court has already found that the applicants' relative must be presumed dead following his unacknowledged detention by State servicemen. In the absence of any justification put forward by the Government, the Court finds that his death can be attributed to the State and that there has been a violation of Article 2 in respect of Magomed-Emi Kudayev.

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

131. The Court has on many occasions stated that the obligation to protect the right to life under Article 2 of 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. It has developed a number of guiding principles to be followed for an

investigation to comply with the Convention's requirements (for a summary of these principles see *Bazorkina*, cited above, §§ 117-119).

132. In the present case, the abduction of Magomed-Emi Kudayev was investigated. The Court must assess whether that investigation met the requirements of Article 2 of the Convention.

133. The Court notes at the outset that most of the documents from the investigation were not disclosed by the Government. It therefore has to assess the effectiveness of the investigation on the basis of the few documents submitted by the parties and the information about its progress presented by the Government.

134. The Court notes that the authorities were immediately made aware of the crime by the applicants' reporting it. The investigation of case no. 30028 was instituted on 13 April 2004 – that is, 16 days after Magomed-Emi Kudayev's abduction and 15 days after the crime scene examination (see paragraphs 23 and 52 above). Such a delay *per se* is liable to affect the investigation of an abduction in life-threatening circumstances, where crucial action has to be taken in the first days after the event. It appears in the present case that after the aforementioned delay a number of essential steps were either significantly delayed or not taken at all. For example, the Court notes that, as can be seen from the decision of the district court (see paragraph 105 above) and the orders of the supervising prosecutors (see paragraphs 64, 71, 75, 88, 91 and 95 above), the investigators only identified and questioned the key witness Mr Ya. Ge. three years after the abduction (see paragraph 78 above). They further failed to identify the servicemen from the *Vostok* battalion which had been described by the witnesses and, in spite of obtaining the results of the ballistics expert's evaluation, the investigators did not try to identify the owners of the firearms fired during the abduction (see paragraph 55 above). Furthermore, the investigators did not try to identify and question the military servicemen who had manned the checkpoint on the night of the abduction or any of the servicemen from the Vedenov district about the location of a military base where the applicants' relative could have been detained. It is obvious that these investigative measures, if they were to produce any meaningful results, should have been taken immediately after the crime was reported to the authorities, and as soon as the investigation commenced. Such delays, 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 crime (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 94, ECHR 2004-XII).

135. The Court also notes that even though the first and second applicants were granted victim status in the criminal proceedings, they were only informed of the suspension and resumption of the proceedings, and not of any other significant developments. 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.

136. Finally, the Court notes that the investigation was suspended and resumed on at least seven occasions and that there were lengthy periods of inactivity on the part of the district prosecutor's office when no proceedings were pending. On several occasions the supervising prosecutors criticised deficiencies in the proceedings and ordered remedial measures (see paragraphs 64, 71, 75, 88, 91 and 95 above), but it appears that their instructions were not complied with.

137. The Government argued that the applicants could have sought judicial review of the decisions of the investigating authorities in the context of the exhaustion of domestic remedies. The Court observes that the applicants did, in fact, make use of that remedy (see paragraph 104 above), which led to the resumption of the investigation almost one and a half months after the court's decision (see paragraphs 92 and 105 above). Nevertheless, the effectiveness of the investigation had already been undermined in its early stages by the authorities' failure to take necessary and urgent investigative steps. Moreover, the district court's order to the investigators to investigate the crime effectively did not bring any tangible results for the applicants. The investigation was repeatedly suspended and resumed, but it appears that no meaningful steps were taken to identify the perpetrators. Accordingly, the Court finds that the remedy cited by the Government was ineffective in the circumstances and dismisses their preliminary objection as regards the applicants' failure to exhaust domestic remedies within the context of the criminal investigation.

138. 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 Magomed-Emi Kudayev, in breach of Article 2 in its procedural aspect.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

139. 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

140. 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.

141. The applicants maintained their submissions.

B. The Court's assessment

1. Admissibility

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

2. Merits

143. The Court observes that the question of whether a member of the family of a “disappeared person” is a victim of treatment contrary to Article 3 will depend on the existence of special factors which give the suffering of the applicants a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the closeness of the family relationship, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in attempts to obtain information about the disappeared person, and the way in which the authorities responded to those enquiries. The Court would further emphasise that 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. It is especially in respect of the latter that a relative may claim to be a direct victim of the authorities’ conduct (see *Orhan v. Turkey*, no. 25656/94, § 358, 18 June 2002).

144. In the present case the Court notes that the first applicant is the wife of the missing person, the second applicant is his mother and the third applicant is his son. It is noteworthy that it was the first and second applicants who lodged petitions and enquiries with the domestic authorities in connection with their relative’s disappearance and who dealt with the investigators. It is quite natural that the third applicant, who was about two years old at the time of his father’s disappearance, did not participate in any manner in the search for Magomed-Emi Kudayev (see, by contrast, *Luhuyev and Others*, cited above, § 112). In the light of these circumstances, the Court, while accepting that the fact of being raised without his father may be a source of continuing distress for the third applicant, cannot assume that the mental anguish he experienced on account of Magomed-Emi Kudayev’s

disappearance and the authorities' attitude towards that incident was distinct from the inevitable emotional distress such a situation would entail, and that it was serious enough to fall within the ambit of Article 3 of the Convention (see, *mutatis mutandis*, *Nenkayev and Others v. Russia*, no. 13737/03, § 168, 28 May 2009, and *Musikhanova and Others v. Russia*, no. 27243/03, § 81, 4 December 2008).

145. As regards the first and second applicants, for more than six years they have not had any news of the missing man. During this period they have made enquiries of various official bodies, both in writing and in person, about their missing relative. Despite their attempts, they have never received any plausible explanation or information about what became of him following his detention. The responses they 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.

146. In view of the above, the Court finds that the first and second applicants suffered, and continue to suffer, distress and anguish as a result of the disappearance of their relative Magomed-Emi Kudayev and their inability to find out what happened to him. The manner in which their complaints have been dealt with by the authorities must be considered to constitute inhuman treatment contrary to Article 3.

147. The Court therefore concludes that there has been a violation of Article 3 of the Convention in respect of the first and second applicants, and no violation of this provision in respect of the third applicant.

V. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

148. The applicants further stated that Magomed-Emi Kudayev 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

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

150. The applicants reiterated the complaint.

B. The Court’s assessment

1. Admissibility

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

2. Merits

152. 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).

153. The Court has found that Magomed-Emi Kudayev was abducted by State servicemen on 27 March 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).

154. 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.

155. In view of the foregoing, the Court finds that Magomed-Emi Kudayev 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.

VI. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

156. 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

157. The Government contended that the applicants had 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 had the opportunity to challenge the acts or omissions of the investigating authorities in court and they could also have claimed damages in civil proceedings.

158. The applicants reiterated the complaint.

B. The Court's assessment

1. Admissibility

159. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes

that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

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

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

162. 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).

VII. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

163. The applicants complained that they had been discriminated against in the enjoyment of their Convention rights, as the violations of which they complained had taken place due to their residence in Chechnya and their ethnic background as Chechens. They complained that such treatment was contrary to Article 14 of the Convention, which reads as follows:

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

164. The Court observes that no evidence has been submitted to it that suggests that the applicants were treated differently from persons in an analogous situation without objective and reasonable justification, or that they have ever raised this complaint before the domestic authorities. It thus finds that this complaint has not been substantiated.

165. It follows that this part of the applications are manifestly ill-founded and should be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

166. 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

167. The first and third applicants claimed damages in respect of loss of earnings by their husband and father Magomed-Emi Kudayev after his arrest and subsequent disappearance. The first applicant claimed 799,257 Russian roubles (RUB) (18,900 euros (EUR)) and the third applicant claimed RUB 211,781 (EUR 5,100). The applicants’ total claim under this heading comprised EUR 24,000.

168. The applicants claimed that they were unable to obtain salary statements for Magomed-Emin Kudayev and that in such cases the calculation should be made on the basis of the subsistence level established by national law. They calculated their earnings for the period, taking into account an average inflation rate of 13.44 %. Their calculations were also based on the actuarial tables for use in personal injury and fatal accident cases published by the United Kingdom Government Actuary’s Department in 2007 (“Ogden tables”).

169. The Government regarded these claims as based on suppositions and unfounded. They also pointed to the existence of domestic statutory machinery for the provision of a pension for the loss of the family breadwinner.

170. 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 may also be claimed by dependent children and that it is reasonable to assume that Magomed-Emi Kudayev would eventually have had some earnings from which the 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 applicants’ relative and the loss by them of the financial support which he could have provided. Having regard to the applicants’ submissions, the Court awards EUR 20,000 to the first and third applicants jointly in respect of pecuniary damage, plus any tax that may be chargeable on that amount.

B. Non-pecuniary damage

171. The applicants jointly claimed EUR 1,000,000 in respect of non-pecuniary damage for the suffering they had endured as a result of the loss of their family member and the indifference shown by the authorities towards them.

172. The Government found the amounts claimed excessive.

173. 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 first and second applicants 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 to the applicants jointly EUR 60,000, plus any tax that may be chargeable thereon.

C. Costs and expenses

174. The applicants were represented by the SRJI. They submitted an itemised schedule of costs and expenses that included research and interviews in Ingushetia and Moscow, at a rate of EUR 50 per hour for the work in the area of exhausting domestic remedies and of EUR 150 per hour for the drafting of submissions to the Court. The aggregate claim in respect of costs and expenses related to the applicants' legal representation amounted to EUR 6,529.

175. The Government did not dispute the reasonableness of and justification for the amounts claimed under this heading.

176. The Court has to establish first whether the costs and expenses indicated by the applicants' representatives were actually incurred and, second, whether they were necessary (see *McCann and Others v. the United Kingdom*, 27 September 1995, § 220, Series A no. 324).

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

178. As to whether the costs and expenses 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 the legal drafting involved was necessarily time-consuming to the extent claimed by the representatives.

179. Having regard to the details of the claims submitted by the applicants, the Court awards them the amount of EUR 4,500 together with any value-added tax that may be chargeable to the applicants, the net award to be paid into the representatives' bank account in the Netherlands, as identified by the applicants.

D. Default interest

180. The Court considers it appropriate that any 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 complaints under Articles 2, 3, 5 and 13 of the Convention admissible and the remainder of the application inadmissible;
3. *Holds* that there has been a substantive violation of Article 2 of the Convention in respect of Magomed-Emi Kudayev;
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 Magomed-Emi Kudayev disappeared;
5. *Holds* that there has been a violation of Article 3 of the Convention in respect of the first and second applicants on account of their mental suffering;
6. *Holds* that there has been no violation of Article 3 of the Convention in respect of the third applicant on account of his mental suffering;
7. *Holds* that there has been a violation of Article 5 of the Convention in respect of Magomed-Emi Kudayev;
8. *Holds* that there has been a violation of Article 13 of the Convention in conjunction with Article 2 of the Convention;
9. *Holds* that no separate issues arise under Article 13 of the Convention in respect of the alleged violations of Articles 3 and 5;

10. *Holds*

(a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Russian roubles at the date of settlement, save in the case of the payment in respect of costs and expenses:

(i) EUR 20,000 (twenty thousand euros), plus any tax that may be chargeable to the applicants, in respect of pecuniary damage to the first and third applicants jointly;

(ii) EUR 60,000 (sixty thousand euros), plus any tax that may be chargeable to the applicants, in respect of non-pecuniary damage to the applicants jointly;

(iii) EUR 4,500 (four 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 representatives' bank account in the Netherlands;

(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;

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

Done in English, and notified in writing on 7 June 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Nina Vajić
President