



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

FIRST SECTION

CASE OF KHASHUYEVA v. RUSSIA

(Application no. 25553/07)

JUDGMENT

STRASBOURG

19 July 2011

FINAL

08/03/2012

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

In the case of Khashuyeva v. Russia,

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

Nina Vajić, *President*,

Anatoly Kovler,

Peer Lorenzen,

George Nicolaou,

Mirjana Lazarova Trajkovska,

Julia Laffranque,

Linos-Alexandre Sicilianos, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 28 June 2011,

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

PROCEDURE

1. The case originated in an application (no. 25553/07) 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 a Russian national, Ms Kameta Khashuyeva (“the applicant”), on 17 May 2007.

2. The applicant was represented by Ms O.A. Sadovskaya, a lawyer with the Committee Against Torture, a non-governmental organisation based in Nizhniy Novgorod. 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 8 September 2009 the Court decided to apply Rule 41 of the Rules of Court, 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.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1969 and lives in Shali, Chechnya. She is the mother of Mamed Bagalayev (also spelled as Magomed Bogalayev), who was born in 1992.

A. Killing of the applicant's son

1. Information submitted by the applicant

5. At the material time the applicant and her family lived at 1 Kutuzova Street, Shali.

6. At about 6 p.m. on 1 August 2003 the applicant's three children, Mamed, his brother Malik and sister Rezida, were playing in the yard of their house. A group of military servicemen in camouflage uniforms and masks, armed with automatic weapons, arrived in an armoured personnel carrier ("APC") and a GAZ-53 lorry at the house of Mr L.M. on Kurgannaya Street, situated next to the applicant's house. The servicemen got out of the vehicles and opened fire at the buildings around. It appeared that they were conducting a special operation.

7. Having heard the shooting, the children ran to hide in the summer house (*временка*) situated in their yard. Inside the summer house, Mamed noticed that he was bleeding and fell unconscious. His sister Rezida, who was thirteen years old at the time, started calling for help. Next, a masked serviceman looked inside the summer house. Rezida told him that her brother had been wounded and that he needed medical help. The soldier told her: "It is nothing, he can wait". After that, several masked soldiers came into the summer house. They searched it and turned everything upside down. The soldiers did not help Mamed Bagalayev; they ordered the children to stay inside and left.

8. For about an hour Mamed was unconscious; his sister and brother did not know whether he was alive. After the shooting stopped at about 7 p.m., a local policeman, Mr R.I., ran into the summer house and took Mamed to the Shali hospital, where it was established that the boy had died.

9. Upon completion of the special operation, the servicemen got back in the APC and the GAZ-53 lorry and drove away in the direction of the former food factory in Shali, the "District Food Plant (*Райпищекомбинат* – "the factory")". When the vehicles were driving away, the tailgate of the GAZ-53 fell off the lorry and was later found by the investigators at the crime scene.

10. At some later point, it was established that the GAZ-53 lorry used by the servicemen belonged to the former food factory. The vehicle's driver, Mr Sh.Sh. (in the documents submitted also referred to as Mr A.Sh. and Mr R.Sh.), informed the applicant and her husband that the lorry had been taken from him by military servicemen prior to the events and that the tailgate which had been lost at the crime scene was returned to the vehicle about a month after the events. The driver had reported this incident to the factory's director, Mr A.B. The latter informed the applicant that on 1 August 2003 he had provided the lorry to the Shali administration upon

their request to this effect, and that after that the vehicle had disappeared and then reappeared about one-and-a-half months later.

11. In support of her statements, the applicant submitted the following documents: a statement by the applicant's husband Mr S.B., undated; a statement by the applicant's neighbour Ms M.A., dated 5 March 2004; a statement by the applicant, dated 5 March 2004; a statement by the applicant's daughter Rezida, dated 5 March 2004; a statement by the director of the former food factory Mr A.B., dated 22 September 2005; a statement by the deputy director of the former food factory Mr N.M., dated 22 September 2005; and a statement by a food factory's driver Mr A.Sh., dated 19 June 2005.

2. Information submitted by the Government

12. The Government did not challenge the facts as presented by the applicant and did not provide a contrary version of the events. They denied any involvement of military servicemen in the death of the applicant's son and stated that unidentified persons, possibly members of illegal armed groups, had been responsible for the killing of Mamed Bagalayev.

B. Official investigation of the incident

1. Information submitted by the applicant

13. At 6.30 p.m. on 1 August 2003 the Shali district department of the interior ("the ROVD") was informed of the fatal shooting of Mamed Bagalayev. On the same date, the district prosecutor's office conducted an examination of the crime scene. As a result, it was established that the walls of Mr L.M.'s house had numerous bullet holes and that its windows were shattered. The investigators collected from the scene two bullet cartridges of calibre 7.62 and the tailgate of the GAZ-53 lorry. At some later point, the tailgate disappeared from the evidence collected during the investigation.

14. On 1 August 2003 the district prosecutor's office carried out a preliminary inspection of Mamed Bagalayev's body. It was established that he had received a perforating gunshot wound to the chest.

15. On 1 August 2003 the ROVD questioned Ms M.A., who stated that at about 6 p.m. on 1 August 2003 a GAZ lorry, followed by an APC, with military servicemen in camouflage uniforms and masks had arrived at her yard whilst the children had been playing there. The witness had asked the men not to open fire but they had ordered her to shut up. After they had finished shooting, the servicemen had gotten back in the APC and the lorry and had driven away.

16. On 2 August 2003 the district prosecutor's office opened an investigation into Mamed Bagalayev's killing under Article 105 § 1 of the Criminal Code (murder). The decision stated, *inter alia*, the following:

“... at about 6.10 p.m. on 1 August 2003 unidentified men in camouflage uniforms and masks, armed with automatic weapons, accompanied by an APC and a GAZ-53 vehicle, opened fire at random at the houses located on Kutuzova Street in Shali.

As a result, M.S. Bagalayev, who was in the yard of house no. 1 in Kutuzova Street, received a gunshot wound to the chest, from which he died on the spot.

...”

The criminal case file was given the number 22112.

17. On 28 August 2003 the investigators forwarded a number of requests to various prosecutors' offices in Chechnya, asking them to provide information as to whether any special operations had been carried out by military units from their districts in the Shali area on 1 August 2003.

18. On 2 October 2003 the investigation of the criminal case was suspended for failure to identify the perpetrators.

19. On 18 January 2005 and then on unspecified dates in March and April 2005 the applicant's lawyer complained to the district prosecutor that the investigation of the criminal case was ineffective and requested that the authorities take, *inter alia*, the following steps: questioning of certain witnesses; informing the applicant and her family of the progress of the investigation; questioning of the ROVD officers who had arrived at the crime scene shortly after the shooting; and questioning of the servicemen who had been stationed at the material time on the premises of the factory in Shali. No reply was given to any of these complaints.

20. On 23 August 2005 the applicant's lawyer complained about the investigation to the Chechnya prosecutor and asked the prosecutor to order the investigators to resume the proceedings, take a number of investigative measures and transfer the criminal case file to the military prosecutor's office for investigation.

21. On 27 September 2005 the district prosecutor informed the applicant's lawyer that on 28 May 2005 he had found serious violations of the criminal procedure regulations on the part of the investigators and that, therefore, he had overruled the decision to suspend the proceedings. In addition, he stated that a number of witnesses had been questioned and that a number of other measures were under way.

22. On 26 October 2005 the investigators again suspended the investigation for failure to identify the perpetrators.

23. On 25 January 2006 the applicant's lawyer asked the district prosecutor's office to grant access to the investigation file.

24. On 27 or 29 January and on 1 February 2006 the district prosecutor's office replied to the lawyer that the decision of 26 October 2005 to suspend

the investigation had been lawful and that he was entitled to access the criminal case file only after the completion of the proceedings.

25. On 27 February 2006 the applicant's lawyer again wrote to the district prosecutor's office and asked for access to the investigation file.

26. On 2 March 2006 the district prosecutor's office again refused to grant the lawyer's request.

27. On 28 March 2006 the applicant's lawyer complained to the Chechnya prosecutor about the lack of access to the documents concerning the criminal proceedings. The letter stated that the investigation was ineffective and that the investigators had consistently refused to provide the applicant with access to the case file. The lawyer requested that the prosecutor examine the investigators' refusals and hold them responsible for violating the applicant's rights.

28. On 19 May 2006 the Chechnya prosecutor's office forwarded the lawyer's complaint to the district prosecutor's office for examination.

29. On 25 May 2006 the district prosecutor's office informed the applicant's lawyer that the investigation had been suspended for failure to identify the perpetrators.

30. On 19 June 2006 the Russian Prosecutor General's office informed the lawyer that his complaint about the lack of access to the case file had been forwarded to the Chechnya prosecutor's office.

31. On 1 July 2006 the district prosecutor's office partially allowed the lawyer's complaint. The decision stated that the lawyer and the applicant's husband, who had been granted victim status in the criminal case, were to be allowed to familiarise themselves with the documents reflecting the steps taken with the victims' participation.

32. On 4 September 2006 the Russian Prosecutor General's office informed the applicant's lawyer that his complaint of unlawful actions on the part of the investigators had been forwarded to the Chechnya prosecutor's office.

33. On 16 October 2006 the Chechnya prosecutor's office forwarded the applicant's complaints about the investigation and the lack of access to the case file to the district prosecutor's office for examination.

34. On 27 July 2007 the district prosecutor's office informed the applicant's husband that he could familiarise himself with the case file.

35. On 22 September 2006 the Chechnya prosecutor's office partially allowed the lawyer's complaint concerning the ineffectiveness of the investigation and numerous procedural violations in the criminal proceedings. On 22 December 2006 the Chechnya prosecutor's office informed the lawyer that they had conducted an inquiry into the investigation of criminal case no. 22112. As a result, a number of procedural violations had been found and the deputy district prosecutor had been penalised.

36. On 27 March 2007 the district prosecutor's office refused to grant the lawyer's request for access to the criminal case file.

37. On 11 December 2008 the investigation of the criminal case was suspended for failure to identify the perpetrators.

38. On an unspecified date between December 2008 and March 2009 the investigation of the criminal case was resumed.

39. On 10 March 2009 the criminal investigation was again suspended for failure to identify the perpetrators. The applicant was not informed of this decision.

40. On 24 March 2009 the applicant's lawyer requested that the investigators allowed him to access the investigation file.

41. On 27 March 2009 district prosecutor's office refused to grant the lawyer's request.

42. On 1 April 2009 the applicant complained about the investigation to the head of the Investigations Department of the district prosecutor's office. In particular, she stated that the investigators had failed to take such indispensable steps as carrying out an expert examination of the bullet cartridges collected from the crime scene, identification of military units equipped with those bullets and requesting information about special operations from the law-enforcement agencies.

43. On 2 April 2009 the investigation of the criminal case was resumed.

44. On 3 April 2009 the investigators rejected the applicant's complaint of 1 April 2009.

45. On 1 May 2009 the criminal investigation was again suspended for failure to identify the perpetrators. The applicant was provided with a copy of this decision on 21 May 2009.

46. On 3 June 2009 the supervising prosecutor overruled the decision of 27 March 2009 as unlawful. The applicant was informed of this in the end of June 2009 during the judicial examination of her complaint against the investigators (see paragraph 121 below).

47. On 7 August 2009 the applicant's lawyer requested that the prosecutor's office grant him access to the case file.

48. On 23 September 2009 the applicant's lawyer was informed that he could familiarise himself with the case file at the prosecutor's office.

49. On 21 January 2010 the applicant's lawyer again requested that the prosecutor's office grant him access to the criminal case file.

50. On 4 February 2010 the investigators partially granted the lawyer's request, stating that he was entitled to familiarise himself only with the documents reflecting the applicant's participation in the criminal proceedings.

51. On 11 February 2010 the investigation of the criminal case was again suspended for failure to identify the perpetrators.

52. On 12 February 2010 the applicant's lawyer asked the prosecutor's office to provide him with copies of the last procedural decisions taken by the investigators in the criminal case. No reply was given to this request.

2. Information submitted by the Government

53. On 1 August 2003 the investigators from the district prosecutor's office examined the crime scene. Two bullet cartridges of calibre 9 mm. along with two bullet cartridge of calibre 7.62 and a tailgate from a GAZ-53 lorry were collected from the scene as evidence.

54. On 1 August 2003 the investigators conducted a preliminary examination of Mamed Bagalayev's body and found two gunshot wounds to the chest.

55. On the same date, 1 August 2003, the investigators questioned the applicant's neighbour, Ms M.A., who stated that a group of armed military servicemen in camouflage uniforms and masks had arrived at her house in a GAZ-53 lorry and in an APC and without any warning had opened fire. She had asked the servicemen to stop the shooting, but they had ordered her to shut up. After the servicemen had left, the witness, together with other residents, had followed their GAZ-53 lorry. The vehicle had driven into the premises of the former food factory.

56. On the same date, 1 August 2003, the investigators also questioned another of the applicant's neighbours, Ms Z.Kh., who stated that a group of military servicemen had arrived in her street in a GAZ-53 lorry and had opened fire. Meanwhile, an APC with armed men had pulled over from another street. The witness and her neighbours had asked the servicemen to allow them to approach the children in the summer house; in response the servicemen had sworn at them.

57. On 2 August 2003 the district prosecutor's office opened criminal case no. 22122 in connection with the murder of Mamed Bagalayev.

58. On 4 August 2003 the investigators granted the applicant's husband victim status in the criminal case.

59. On 18 August 2003 the district prosecutor requested that the military prosecutor of military unit no. 20116 provide him with an officer to assist in the investigation of the criminal case. The text of the letter included the following:

"... taking into account that there are sufficient grounds to believe that the crime [against Mamed Bagalayev] was committed by military servicemen, we are creating a group of investigators and, therefore, you are requested to provide an officer for participation in the investigation of the criminal case ..."

60. On 28 August 2003 the investigators forwarded requests to various district prosecutors' offices in Chechnya, asking to be informed whether these bureaux had conducted any special operations in Shali on 1 August 2003.

61. On 2 October 2003 the investigation of the criminal case was suspended for failure to identify the perpetrators.

62. On 18 January 2005 the applicant's lawyer complained to the district prosecutor that the investigation of Mamed Bagalayev's murder was ineffective. In particular, he stated that the investigators had not questioned the applicant's husband, the brother and sister of Mamed Bagalayev with whom he had hidden in the summer house, that they had not established the reasons for either the servicemen's failure to provide Mamed with medical assistance or for their actions preventing the locals from helping him. The lawyer requested that the authorities resume the investigation, take a number of steps and inform the applicant of the progress of the proceedings.

63. On 20 May 2005 the applicant's lawyer complained about the investigation to the district prosecutor, stating that a number of crucial steps (such as questioning of eyewitnesses and military servicemen) had not been taken and that the proceedings had been suspended unlawfully.

64. On 19 June 2005 the driver of the GAZ-53 lorry gave a statement to the applicant's lawyer. According to him, the lorry belonged to the factory. In the summer of 2003 he had been ordered by military servicemen to hand the lorry over to them. He had later been told that this vehicle had been used by the military at the place of Mamed Bagalayev's murder. This statement was submitted to the investigators and included in the case file.

65. On 22 July 2005 the applicant's lawyer wrote to the district prosecutor and requested that the prosecutor reply to the following questions:

“... on the day of Mamed Bagalayev's murder you ordered that the lorry with its driver was to be taken to the Shali administration and then handed over to the military servicemen stationed on the premises of [the factory]. It is necessary to find out who the military serviceman were that received the vehicle (without its registration numbers) from the driver.

About one month later, the GAZ-53 lorry was returned to [the factory]. It is currently being driven by another driver.

... I request that you submit to the investigation your statement concerning the circumstances which are known to you and that you officially reply to my questions:

Who is currently driving the GAZ-53 lorry and where it is being stationed?

When was the vehicle's tailgate taken away from the Shali ROVD? [...]"

66. On the same date the applicant's lawyer complained to the military prosecutor of the United Group Alignment (“the UGA”) and the district prosecutor that the investigation of the criminal case was ineffective. In particular, he pointed out the following:

“... The investigation is being conducted in a slipshod manner. It is obvious that the death of Mamed Bagalayev was caused by a gunshot from a military serviceman's automatic weapon ...

... For your information, as of 21 June 2005 neither eyewitnesses to the events, nor the parents of the murdered boy have been questioned by the investigators. The investigators have not questioned any of the servicemen stationed on the premises of [the factory] either ... The investigation has failed to establish the circumstances under which the lorry's tailgate was put back on the vehicle in spite of the fact that, according to the crime scene examination report, it had been collected as evidence and taken to the Shali ROVD ...”

67. On 16 August 2005 the applicant's lawyer lodged complaints with the district prosecutor's office and the Chechnya prosecutor's office. He stated that the investigation of Mamed Bagalayev's murder was ineffective and pointed out, amongst other things, the following failures of the investigative authorities:

“... on 2 October 2003 the investigators suspended the investigation without even having taken the most basic steps ... such as:

(a) [The applicant's husband] S.M. Bagalayev ... was not questioned, in spite of the fact that he regularly keeps seeing the GAZ-53 lorry in which the military servicemen had arrived at the crime scene ...; he had spoken with the lorry's driver and found out why it had arrived at the scene ... this vehicle belongs to [the factory], on the premises of which military units have been stationed ... The tailgate which had fallen off the vehicle was collected as evidence from the crime scene, but at a later date the lorry was seen driving around with this very tailgate - who took this evidence out of the investigation file? Why had the lorry belonging to [the factory] been used by the military servicemen? Who drove this vehicle on the day of the events? ... The investigators left these questions without examination ...

(b) [The applicant's relatives] who had witnessed the events have not been questioned, in spite of the fact that they could assist in establishing the factual circumstances of the events;

(c) The investigators failed to examine the circumstances surrounding the [disappearance] of the GAZ-53's tailgate, which, according to the witnesses, had fallen off the lorry after the military servicemen had finished the special operation and had been driving away;

(d) The investigators failed to request information from the Shali military commander's office concerning any special operations conducted on 1 August 2003 with the participation of the servicemen stationed on the premises of [the factory];

(e) The investigators failed to question the officers from the Shali ROVD who had arrived at the crime scene after they had heard the shooting (for example, officer Sh.Sh.);

(f) The investigators failed to question witness Mr R.I. and the director of [the factory], whose firm owned the GAZ-53 lorry used by the military servicemen at the crime scene;

(g) The investigators failed to obtain information from the military command concerning the military units used for the pin-point military operation ...

(h) The investigators failed to establish why, for one hour, no medical assistance was provided to Mamed Bagalayev and why those who had wanted to provide it to him had been threatened [and precluded from doing it] by the military servicemen.

...”

68. On 22 August 2005 the Chechnya prosecutor’s office asked the district prosecutor to inform them of the reasons for their failure to react to the applicant’s lawyer’s numerous complaints about the investigation lodged on 15 and 18 January, 20 May, 27 July and 19 August 2005.

69. On 25 August 2005 the supervising prosecutor overruled the decision to suspend the criminal investigation as premature and unsubstantiated and ordered that the investigators take, amongst others, the following steps:

“... - granting relatives of Mamed Bagalayev victim status in the criminal case and questioning them;

- questioning of other relatives of Mamed Bagalayev;
- identification and questioning of witnesses to the crime;
- ordering and conducting a forensic examination of Mamed Bagalayev’s body;
- requesting information from the Shali military commander’s office, the military commander’s office of military unit no. 20116, the command of the United Group Alignment (“the UGA”), the Chechnya Department of the Federal Security Service (the FSB) and finding out whether these agencies conducted a special operation in Shali in the beginning of August 2003 ...”

70. On 26 August 2005 the investigation of the criminal case was resumed.

71. On 29 August 2005 the investigators granted the applicant victim status in the criminal case and questioned her. The applicant stated that on 1 August 2003 she and her husband had been away from their house. In the evening they had been on their way home, when at about 6.40 p.m. her neighbour had informed her that a special operation was being conducted in their street by military servicemen. When she had arrived at the crime scene, she had been told that her son had been shot, wounded and taken to the Shali hospital. After that, the applicant and her husband had gone to the hospital, where they had been told that their son had been sent back home. The applicant and her husband had gone home where they had found out that their son had died.

72. On 29 August 2005 the applicant’s lawyer again complained about the investigation to the Chechnya prosecutor and asked to be granted access to the investigation file.

73. On 30 August 2005 the investigators requested that the Shali military commander’s office, the Shali ROVD and the head of the UGA inform them

whether these agencies had conducted any special operations in Shali on 1 August 2003.

74. On various dates in September 2005 the investigators asked military unit no. 20116, the UGA and the Chechnya FSB to inform them whether they had conducted any special military operations in Shali on 1 August 2003. According to the replies received, none of the agencies had conducted such operations on the specified date.

75. Based on the contents of the investigation file, on 15 September 2005 the investigators ordered a forensic examination of Mamed Bagalayev's body.

76. On the same date, 15 September 2005, the Chechnya Forensics Bureau concluded that the cause of Mamed Bagalayev's death could have been the perforating wound to the right side of his chest.

77. On 19 September 2005 the investigators questioned the applicant's husband, who stated that he had arrived at his house at about 7 p.m. on 1 August 2003. His neighbours had told him that his son Mamed Bagalayev had been shot and wounded by military servicemen and that the boy had been taken to hospital, but to no avail.

78. On the same date, 19 September 2005, the investigators questioned the applicant's relative Mr S.-M.B., who stated that on 1 August 2003 he had been at home when his daughter had told him that his nephew Mamed Bagalayev had been shot by military servicemen. The witness had immediately gone to the hospital, where he had found out that Mamed had died from his wounds.

79. On 3 October 2005 the investigators questioned the director of the factory, Mr A.B., who stated that on 1 August 2003 the head of the Shali administration, Mr M.D., had asked his permission to use his company's lorry. The witness had authorised the driver, Mr Sh.Sh., to go with his GAZ-53 lorry to assist the administration. At some point later on the same date, the driver had informed the witness that military servicemen had taken the lorry away from him at the administration's premises. After that, the lorry had disappeared but was returned one-and-a-half months later to the factory by unidentified persons.

80. On 7 October 2005 the investigators questioned a police officer of the Shali ROVD, Mr R.I., who stated that on 1 August 2003 he had been informed by his friends that, on the road next to Shali, military servicemen had conducted a special operation, as a result of which a boy had been killed. He had immediately rushed to the scene. The area had been cordoned off by armed masked men, who had refused to answer questions. He had followed two of these men to the yard of the Bagalayev family, where he had heard children crying. The witness had rushed to the summer house, where he had found Mamed Bagalayev bleeding and with a weak pulse, and his brother and sister next to him. The witness had carried Mamed outside and had taken him to the Shali hospital, where Mamed had died. When the

witness had been leaving the yard, he had seen an APC and a GAZ-53 lorry, both full of armed servicemen in camouflage uniforms, leaving the scene. He had immediately recognised the GAZ-53 lorry, as it had belonged to the factory. According to the witness, the military servicemen had not prevented him from accessing the summer house and taking the boy to the hospital. Having taken Mamed Bagalayev to the hospital, the witness had returned to the scene, where he and his colleagues had found the tailgate of the GAZ-53 lorry and had taken it to the Shali ROVD.

81. On 20 October 2005 the investigators questioned Mr R.Sh., who stated that in 2003 he had worked as a driver of a GAZ-53 lorry for the factory. In August 2003 he had learnt that his vehicle had been used by criminals who had committed the murder of Mamed Bagalayev.

82. On 26 October 2005 the investigation of the criminal case was suspended for failure to identify the perpetrators. The applicant was informed of this on the same date.

83. On 7 December 2005 the applicant's lawyer requested that the investigators resume the investigation of the criminal case.

84. On 25 January 2006 the applicant's lawyer requested that the investigators resume the proceedings, establish which military unit had carried out the special operation on 1 August 2003 and question military servicemen stationed in the Shali area. He also requested that the victims in the criminal case be provided with access to the investigation file.

85. On 29 January 2006 the investigators rejected his request, stating that the proceedings were still pending and that the victims were allowed to familiarise themselves with the contents of the file only upon completion of the investigation.

86. On 27 February 2006 the applicant's lawyer again asked to be provided with access to the investigation file.

87. On 2 March 2006 the deputy district prosecutor rejected his request.

88. On 2 May 2006 the investigators again refused to allow the applicant's lawyer to access the investigation file.

89. On 17 May 2006 the applicant's lawyer again complained about the investigation to the Chechnya prosecutor and requested that the suspended criminal proceedings be resumed.

90. On 25 May 2006 the deputy district prosecutor rejected his request.

91. On 8 June 2006 the supervising prosecutor overruled the decision to suspend the investigation as premature and unsubstantiated and ordered that it be resumed. He ordered that the investigators take a number of steps, including conducting a ballistic expert evaluation of the bullet cartridges collected from the crime scene and questioning of a number of witnesses to the crime.

92. On 22 June 2006 the investigators questioned Mamed Bagalayev's sister Rezida, who stated that on 1 August 2003 she had been playing in the yard with her brothers Mamed and Malik. At about 5.30 p.m. they had heard

gunfire and then she had noticed that her brother Mamed was bleeding. They had run into the summer house. Three armed men in camouflage uniforms had entered the summer house, had pointed their guns at the witness and her brothers and had searched the place. She had asked the men to help Mamed, who was bleeding, but the men had neither helped nor had allowed anyone else to approach him. They had told her that “nothing will happen to your brother”. Then the police officer from the Shali ROVD, Mr R.I., had taken Mamed to hospital, but her brother had died on the way there. The witness further stated that due to the passage of time she would not be able to identify the armed men.

93. On the same date, 22 June 2006, the investigators questioned Mamed Bagalayev’s brother Malik, whose statement about the events was similar to the one given by his sister Rezida.

94. On 1 July 2006 the deputy Chechnya prosecutor partially upheld the complaint brought by the applicant’s lawyer and allowed him to examine those contents of the investigation file which reflected the victims’ participation in the criminal proceedings.

95. On 15 July 2006 the investigation of the criminal case was again suspended for failure to identify the perpetrators. The applicant was not informed of this decision.

96. On 31 August 2006 the applicant’s lawyer complained to the Department of the Prosecutor General’s office in the Southern Federal Circuit about unlawful refusals on the part of the Chechnya prosecutor to allow him and the victims to access the contents of the investigation file.

97. On 22 September 2006 the deputy Chechnya prosecutor ordered an inquiry in connection with the lawyer’s complaint about the lack of reply to his requests pertaining to the investigation of Mamed Bagalayev’s death.

98. On 22 September 2006 the Chechnya prosecutor informed the applicant’s lawyer that they had established violations of criminal procedure regulations by the investigators of the criminal case.

99. On 27 March 2007 the deputy district prosecutor rejected the applicant’s lawyer’s request for access to the investigation file.

100. On 8 July 2006 the investigation of the criminal case was again suspended for failure to identify the perpetrators. The applicant was not informed of this decision.

101. On 8 November 2008 the investigation of the criminal case was resumed upon a complaint brought by the applicant’s lawyer on 5 November 2008 of the investigators’ failure to comply with the Town Court’s decision of 24 July 2008 (see paragraph 119 below).

102. On various dates in November 2008 the investigators forwarded requests to a number of military and law-enforcement agencies, asking them to provide information as to whether any special operations had been conducted by them on 1 August 2003. It does not appear that any replies were received to these requests.

103. On 11 December 2008 the investigation of the criminal case was again suspended for failure to identify the perpetrators. The applicant was not informed of this decision.

104. On 16 February 2009 the supervising prosecutor overruled the decision to suspend the investigation as premature and unsubstantiated and ordered that a number of measures be taken. The investigators were to take, amongst others, the following steps: ordering a ballistic expert examination of the bullet cartridges collected from the crime scene; questioning of witnesses; establishing which military unit had been stationed on the premises of the factory at the material time; and establishing the circumstances under which the GAZ-53 lorry had been taken away from its driver by military servicemen. The supervising prosecutor's orders were not complied with.

105. On 10 March 2009 the investigation of the criminal case was again suspended for failure to identify the perpetrators.

106. On 24 March 2009 the applicant's lawyer again asked the investigators to provide him with access to the investigation file. On 27 March 2009 his request was rejected.

107. On 1 April 2009 the applicant's lawyer complained to the district prosecutor's office of the investigators' failure to comply with the court decision of 24 July 2008 (see paragraph 119 below) and requested that he be informed whether, amongst other things, the ballistic expert examination of the cartridges collected from the crime scene had been carried out. His complaint was rejected on 3 April 2009.

108. On 2 April 2009 the investigators resumed the proceedings in the criminal case.

109. On 1 May 2009 the investigation of the criminal case was again suspended for failure to identify the perpetrators.

110. On 3 June 2009 the supervising prosecutor ordered that the applicant's lawyer be provided with access to those contents of the case file which reflected the victims' participation in the criminal proceedings.

111. On 18 September 2009 the investigators informed the lawyer that he was allowed to familiarise himself with selected contents of the investigation file.

112. On 9 November 2009 the supervising prosecutor overruled the decision to suspend the investigation as premature and the proceedings were resumed.

113. According to the documents submitted by the Government, the investigation was suspended and resumed on several occasions, but it has so far failed to identify the perpetrators of Mamed Bagalayev's murder. On a number of occasions the supervising prosecutors criticised the progress of the proceedings and stated that a number of important investigative steps should be taken without delay, but their orders were not complied with.

114. Upon a request by the Court, the Government, referring to Article 161 of the Russian Criminal Procedure Code, disclosed a number of documents from criminal case no. 22112 running to 266 pages.

C. Proceedings against the investigators

115. On 23 September 2005 the applicant's lawyer complained to the Shali District Court ("the District Court") of the ineffectiveness of the criminal investigation. He requested that the court order the investigators to question certain witnesses, request information from the military commander about the servicemen who had participated in the special operation on 1 August 2003 and clarify the circumstances surrounding the disappearance of the lorry whose tailgate had been found at the crime scene.

116. On 25 September 2005 the District Court fully allowed the complaint and stated that the investigators' actions had been unlawful.

117. On an unspecified date between October 2005 and April 2006 the applicant complained to the Shali Town Court ("the Town Court") of ineffective investigation of the criminal case and the lack of access to the case file.

118. On 3 April 2006 the Shali Town Court partially allowed the complaint and instructed the prosecutor's office to provide the applicant's lawyer with access to the criminal case file, with the exception of documents containing state secrets. The decision stated, *inter alia*, the following:

"... at about 6.10 p.m. on 1 August 2003 unidentified masked men in camouflage uniforms, armed with automatic weapons, with the support of armoured vehicles and a GAZ-53 automobile arrived at the crime scene and opened fire at random at the houses in Kutuzova Street ... as a result, M. Bagalayev ... was wounded in the chest ... and died on the spot ...

On 2 August 2003 the district prosecutor's office opened criminal case no. 22112 ... the investigation of the criminal case, without taking necessary investigative measures ... was suspended on 2 October 2003.

[The applicant's lawyer] forwarded a number of requests and complaints to the district prosecutor's office:

- on 15 January 2005 he lodged a request that Mr S. Bagalayev, Ms Z. Bagalayeva and Ms R.B. be questioned and that other necessary investigative measures be taken ...

- on 20 May 2005 he lodged a request that the circumstances surrounding the disappearance of the tailgate of the lorry be investigated ...

- [he asked the investigators] to find out whether the Shali military commander had given his approval to this operation involving military servicemen (on 1 August

2003 the servicemen had been stationed on the premises of the [factory] and the GAZ-53 vehicle [still] belongs to this organisation);

- [he asked the investigators] to question those officers of the Shali ROVD who had arrived at the scene of the shooting, for example, to question officer Sh.Sh., as well as the director of [the factory] and other individuals;

...

On 30 September 2005 the Shali district court found the actions of the Shali district prosecutor's office to be unlawful. However, in spite of this, a number of investigative steps have not been taken [by the investigators]:

- it has not been established which military units stationed on the premises of [the factory] participated in this operation;

- it has not been established which officer was in charge of the military unit and under whose orders the servicemen arrived at the Bagalayev's house ...;

- the driver of the GAZ-53 has not been questioned by the investigators; the circumstances surrounding the disappearance of the lorry's tailgate, which had been found at the crime scene ... were not examined.

..."

119. On an unspecified date in 2008 the applicant complained of ineffective investigation to the Town Court. On 24 July 2008 the court allowed the applicant's complaint in full. It criticised the investigation and stated that the proceedings had been suspended unlawfully without the most important investigative steps having been taken, and ordered that they be resumed (see paragraph 107 above). This decision was not complied with.

120. On 21 May 2009 the applicant again complained to the Town Court. She argued that the investigation was ineffective and that the investigators' refusal to allow her lawyer to access the case file was unlawful (see paragraph 42 above).

121. On 22 June 2009 the Town Court left the applicant's complaint without examination, as the request for access to the case file had been granted on 3 June 2009 (see paragraph 110 above).

II. RELEVANT DOMESTIC LAW

122. For a summary of the relevant domestic law see *Abdurashidova v. Russia*, no. 32968/05, § 51, 8 April 2010.

THE LAW

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

A. The parties' submissions

123. The Government contended that the complaint should be declared inadmissible for non-exhaustion of domestic remedies. They submitted that the investigation into the murder of Mamed Bagalayev had not yet been completed. They further argued that it had been open to the applicant to challenge in court any acts or omissions of the investigating authorities, and that she had availed herself of that remedy and could have continued to rely on it.

124. The applicant contested that objection. She stated that the criminal investigation had proved to be ineffective and that her complaints to that effect, including her applications to the local courts, had been futile.

B. The Court's assessment

125. 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).

126. As regards criminal law remedies provided for by the Russian legal system, the Court observes that the applicant complained to the law-enforcement authorities immediately after the murder of Mamed Bagalayev and that an investigation has been pending since 2 August 2003. The applicant and the Government dispute the effectiveness of the investigation of the murder.

127. 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 applicant's 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

128. The applicant maintained that it was beyond reasonable doubt that the men who had killed Mamed Bagalayev had been State agents. In support of her complaint she referred to the following facts. At the material time Shali had been under the total control of federal troops. Russian military units had been stationed on the factory's premises. The armed men who had killed Mamed Bagalayev had been wearing a specific camouflage uniform and had acted in a manner similar to that of military forces carrying out a special operation. The men had arrived in a military APC and a GAZ-53 vehicle in broad daylight and had opened fire in the presence of many witnesses, which indicated that they had not feared being heard by law-enforcement agencies located in the town. All the information disclosed in the criminal investigation file supported the applicant's assertion as to the State agents' responsibility for the death of Mamed Bagalayev.

129. The Government submitted that unidentified armed men had killed Mamed Bagalayev. They further contended that the investigation of the incident was pending, that there was no evidence that the culprits had been military servicemen and that there were therefore no grounds for holding the State liable for the alleged violations of the applicant's rights. The Government pointed out that the fact that the perpetrators had spoken Russian, had been wearing camouflage uniforms and had arrived in an APC and a GAZ-53 vehicle did not mean that these men could not have been members of illegal armed groups.

B. The Court's evaluation of the facts

130. The Court relies on a number of principles that have been developed in its case-law when it is faced with the task of establishing facts on which the parties disagree. As to the facts in dispute, the Court refers to its jurisprudence confirming the standard of proof "beyond reasonable doubt" in its assessment of the evidence (see *Avşar v. Turkey*, no. 25657/94, § 282, ECHR 2001-VII (extracts)). Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact. In this context, 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).

131. The Court notes that, despite its requests for a complete copy of the investigation file into the death of Mamed Bagalayev, the Government have produced only a part of documents from the case file on the grounds that

they are precluded from disclosing the remaining documents by Article 161 of the Code of Criminal Procedure. The Court observes that in previous cases it has found this explanation insufficient to justify the withholding of key information requested by the Court (see *Imakayeva v. Russia*, no. 7615/02, § 123, ECHR 2006-XIII (extracts)).

132. 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 applicant's allegations. The Court will thus proceed to examine crucial elements in the present case that should be taken into account when deciding whether the death of the applicant's son can be attributed to the authorities.

133. The applicant alleged that the persons who had killed Mamed Bagalayev on 1 August 2003 had been military servicemen. The Government denied the involvement of military servicemen in the events. At the same time, they did not dispute any of the factual elements underlying the application and did not provide another explanation for the events in question.

134. The Government suggested in their submissions that the perpetrators of Mamed Bagalayev's murder might have been members of illegal armed groups. However, this allegation was not specific and the Government did not submit any material to support it. The Court takes note of the Government's allegation that the vehicles, firearms and camouflage uniforms had probably been illegally obtained by the perpetrators. Nevertheless, it considers it very unlikely that the GAZ-53 lorry, which had been taken away from its driver by military servicemen on the day of the events, could have been unlawfully possessed by members of illegal armed groups and could have driven around freely in Shali on the same date with an APC without being noticed. The Court would stress in this regard that the evaluation of the evidence and the establishment of the facts is a matter for the Court, and it is incumbent on it to decide on the evidentiary value of the documents submitted to it (see *Çelikkilek v. Turkey*, no. 27693/95, § 71, 31 May 2005).

135. The Court notes that the applicant's allegation is supported by the witness statements collected by her and by the investigation, as well as by the available evidence. It finds that the fact that a large group of armed men in uniform in broad daylight, equipped with an APC and a lorry, were able to drive around the town and open fire without being afraid of being heard by local law-enforcement authorities strongly supports the allegation that these were military servicemen conducting a security operation. In their submissions to the authorities, the applicant and the witnesses to the events consistently maintained that Mamed Bagalayev had been shot by unknown military servicemen (see paragraphs 19, 42, 55, 56, 64-67, 71, 77-80 above). On numerous occasions the applicant and her lawyer requested that the investigation look into that possibility. The domestic investigation accepted

these factual assumptions and took steps to check whether military servicemen were involved in Mamed Bagalayev's killing (see paragraphs 59 and 73 above), but it appears that no serious investigative steps were taken in that direction.

136. 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)).

137. Taking into account the above elements, the Court is satisfied that the applicant has made out a prima facie case that her son was killed by military servicemen. The Government's statement that the investigators had not found any evidence to support the involvement of State agents in the events 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 Mamed Bagalayev was deprived of his life by State servicemen.

III. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

138. The applicant complained under Article 2 of the Convention that her son had been killed by military 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

139. The Government stated that the domestic investigation had obtained no evidence to the effect that any State servicemen had been involved in the killing of Mamed Bagalayev and contended that unidentified criminals had been responsible for his death. They further claimed that the investigation of the murder met the Convention requirement of effectiveness, as all measures available under national law were being taken to identify the perpetrators. The Government did not comment on the applicant's allegation concerning the authorities' failure to protect the life of her son.

140. The applicant argued that Mamed Bagalayev had been killed by State servicemen. At the same time, she alluded in broad terms that the domestic authorities had also failed to comply with the positive obligation under Article 2 to protect her son's life. She further submitted that the investigation into the events had not met the effectiveness and adequacy requirements laid down by the Court's case-law. The applicant also pointed out that by February 2009 the investigators had failed to take crucial investigative steps and that she had not been informed of the progress of the criminal 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.

B. The Court's assessment

1. Admissibility

141. 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 127 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 Mamed Bagalayev

142. As for the applicant's allusion concerning the authorities' failure to comply with their positive obligation under Article 2 to protect the right to life of Mamed Bagalayev, taking into account its vague nature and the absence of any relevant comment from the Government, the Court will

proceed to examine her complaint in the light of the negative obligation of the said provision.

143. The applicant alleged that State servicemen had killed her son. The Court reiterates that 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).

144. The Court has already established that the death of Mamed Bagalayev can be attributed to the State. In the absence of any justification put forward by the Government, the Court finds that there has been a violation of Article 2 in respect of Mamed Bagalayev.

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

145. 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 v. Russia*, no. 69481/01, §§ 117-119, 27 July 2006).

146. In the present case, the death of the applicant's son was investigated. The Court must assess whether that investigation met the requirements of Article 2 of the Convention.

147. The Court notes at the outset that only part of the documents from the investigation file were disclosed by the Government. It therefore has to assess the effectiveness of the investigation on the basis of the documents submitted by the parties and the information about its progress presented by the Government.

148. The Court notes that the authorities were immediately made aware of the crime. The investigation was opened promptly, the crime scene was examined without delay, evidence was collected from the scene and two witnesses to the events were questioned (see paragraphs 53-57 above). However, after that, a number of very important steps were either delayed (for example, the key witnesses to the events were questioned only in June 2006 – that is, almost three years later (see paragraphs 92 and 93 above)) or not taken at all. In particular, the Court notes that, as can be seen from the orders of the supervising prosecutors and the decisions of domestic courts, the investigators failed to take a number of the most essential steps such as

identification of the military unit stationed on the premises of the former food factory in Shali and questioning of a number of witnesses, including the ROVD officers, the applicants' neighbours and the military command in Shali. Further, the investigators failed to carry out an autopsy of Mamed Bagalayev's body or order a ballistic expert examination of the cartridges collected from the scene; they neither elucidated the circumstances under which the tailgate of the GAZ-53 lorry had disappeared from the investigation file nor found out how the lorry had been returned to its owners (see paragraphs 67, 104, 107 and 119 above). It is obvious that these 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).

149. The Court also notes that even though the applicant was eventually granted victim status in the investigation concerning her son's murder, she was 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.

150. Finally, the Court notes that the investigation was suspended and resumed several times and that there were lengthy periods of inactivity on the part of the prosecutor's office when no proceedings were pending. On a number of occasions the supervising prosecutors and domestic courts criticised deficiencies in the proceedings and ordered remedial measures, but their instructions were not complied with.

151. The Government argued that the applicant 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 applicant did, in fact, make use of that remedy, which eventually led to the resumption of the investigation. Nevertheless, the effectiveness of the investigation had already been undermined in its early stages by the authorities' failure to take necessary and urgent investigative measures. Moreover, the domestic court's instructions to the prosecutor's office to investigate the crime effectively did not bring any tangible results for the applicant. The investigation was repeatedly suspended and resumed, but it appears that no significant investigative steps were taken to identify those responsible for the murder of Mamed Bagalayev. In such circumstances, the Court considers that the applicant could not be required to challenge in court every single decision of the investigative authorities. Accordingly, the Court

finds that the remedy cited by the Government was ineffective in the circumstances and dismisses their objection as regards the applicant's failure to exhaust domestic remedies within the context of the criminal investigation.

152. 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 death of Mamed Bagalayev, in breach of Article 2 in its procedural aspect.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

153. The applicant relied on Article 3 of the Convention, submitting that as a result of her son's murder and the State's reaction thereto, she 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."

Admissibility

154. In the present case, even though the Court does not doubt that the tragic death of her son caused the applicant profound suffering, it nonetheless notes that the case concerns the instantaneous deprivation of life as a result of gunfire. In this regard, the Court refers to its practice by which the application of Article 3 is usually not extended to the relatives of persons who have been killed by the authorities in violation of Article 2 (see *Yasin Ateş v. Turkey*, no. 30949/96, § 135, 31 May 2005) or to cases of unjustified use of lethal force by State agents (see *Isayeva and Others v. Russia*, nos. 57947/00, 57948/00 and 57949/00, § 229, 24 February 2005), as opposed to the relatives of the victims of enforced disappearances. The latter approach is exercised by the Court in view of the continuous nature of the psychological suffering of applicants whose relatives have disappeared and their resulting inability for a prolonged period of time to find out what happened to them (see, among many other authorities, *Bazorkina*, cited above, § 141; *Imakayeva*, cited above, § 166; and *Luhuyev and Others v. Russia*, no. 69480/01, § 115, ECHR 2006-XIII (extracts)). In these circumstances, taking into account the instantaneous nature of the incident, the Court does not find that it amounts to a violation of Article 3 of the Convention.

155. It therefore follows that this part of application should be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention (see *Udayeva and Yusupova v. Russia*, no. 36542/05, §§ 82-83, 21 December 2010).

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

156. The applicant complained that she had been deprived of an effective remedy in respect of the alleged violation of Article 2 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 applicant had had effective remedies at her disposal as required by Article 13 of the Convention and that the authorities had not prevented her from using those remedies. The applicant had had the opportunity to challenge the acts or omissions of the investigating authorities in court. They added that she could have claimed damages in civil proceedings. In sum, the Government submitted that there had been no violation of Article 13.

158. The applicant maintained the complaint.

B. The Court’s assessment

159. The Court reiterates that Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. Given the fundamental importance of the right to the protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life, including effective access for the complainant to an investigative procedure leading to the identification and punishment of those responsible (see *Anguelova v. Bulgaria*, no. 38361/97, §§ 161-162, ECHR 2002-IV, and *Süheylya Aydın v. Turkey*, no. 25660/94, § 208, 24 May 2005). The Court further reiterates that the requirements of Article 13 are broader than a Contracting State’s obligation under Article 2 to conduct an effective investigation (see *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, § 183, 24 February 2005).

160. In view of the Court’s above findings with regard to Article 2, this complaint is clearly “arguable” for the purposes of Article 13 (see *Boyle and Rice v. the United Kingdom*, § 52, Series A no. 131). The applicant should accordingly have been able to avail herself of effective and practical remedies capable of leading to the identification and punishment of those responsible and to an award of compensation for the purposes of Article 13.

161. It follows that in circumstances where, as here, the criminal investigation into the murder of Mamed Bagalayev was ineffective and the effectiveness of any other remedy that may have existed was consequently undermined, the State has failed in its obligation under Article 13 of the Convention.

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

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

163. 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. Non-pecuniary damage

164. The applicant claimed 45,000 euros (EUR) in respect of non-pecuniary damage for the suffering she had endured as a result of the loss of her minor son, the indifference shown by the authorities towards her and their procrastination with regard to the criminal investigation of his death.

165. The Government found the amounts claimed excessive.

166. The Court has found a violation of Articles 2 and 13 of the Convention on account of the death of the applicant's son and the authorities' failure to investigate it effectively. The Court thus accepts that she has suffered non-pecuniary damage which cannot be compensated for solely by the findings of violations. It awards to the applicant EUR 45,000 as claimed, plus any tax that may be chargeable thereon.

B. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *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 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 Mamed Bagalayev;
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 surrounding the death of Mamed Bagalayev;
5. *Holds* that there has been a violation of Article 13 of the Convention in conjunction with Article 2 of the Convention;
6. *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 amount, to be converted into Russian roubles at the date of settlement:
 - (i) EUR 45,000 (forty-five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage to the applicant;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 19 July 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Nina Vajić
President