



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

FIRST SECTION

CASE OF TASHUKHADZHIYEV v. RUSSIA

(Application no. 33251/04)

JUDGMENT

STRASBOURG

25 October 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 Tashukhadzhiyev v. Russia,

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

Nina Vajić, *President*,

Anatoly Kovler,

Elisabeth Steiner,

Khanlar Hajiyev,

Mirjana Lazarova Trajkovska,

Julia Laffranque,

Linos-Alexandre Sicilianos, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 4 October 2011,

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

PROCEDURE

1. The case originated in an application (no. 33251/04) 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, Mr Abdulbek (also referred to as Imali) Tashukhadzhiyev, on 5 August 2004.

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

3. The applicant alleged that his son “disappeared” after being detained by Russian military servicemen in February 1996 in Chechnya. He referred to Articles 2, 5, 6, 13 and 14 of the Convention.

4. On 9 March 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

5. The applicant was born in 1936. He is the father of Elbek Tashukhadzhiyev, who was born in 1970. At the material time the applicant lived in Berkhat-Yurt, Chechnya. He currently lives in Shali, Chechnya.

A. Disappearance of Elbek Tashukhadzhiyev

1. Information submitted by the applicant

(a) Detention of the applicant's son

6. At the material time, during the first counterterrorist campaign in Chechnya, Elbek Tashukhadzhiyev worked as a driver of a URAL petrol tanker. On 9 February 1996 (in the documents submitted the date was also referred to as 11 February 1996) he was driving his lorry on the outskirts of Berkat-Yurt, Chechnya. Next to the village, in the vicinity of a Russian military checkpoint, he was stopped by a group of military intelligence officers under the command of Major A.Z. The group belonged to military unit no. 74614 of the 205th brigade of the Internal Troops of the Russian Ministry of the Interior. After that, the applicant's son disappeared.

(b) The search for the applicant's son

7. On 10 February 1996 the applicant started a search for his son. On 12 February 1996 he found out that his son had been detained by the military servicemen. The applicant went to the base of an air force squadron stationed in the area, together with the head of the Berkat-Yurt village administration. There they spoke to the squadron commander and showed him a photograph of Elbek Tashukhadzhiyev. They told the commander that on 9 February 1996 Elbek had been detained by the military servicemen. The commander informed them that on 9 February 1996 a group of military intelligence officers, under the command of a Major, had arrived at their base with a detainee. They had introduced themselves as representatives of the 205th brigade of the Internal Troops and explained that they had arrived to provide medical assistance to two soldiers who had been blown up by a landmine. This intelligence group had arrived with a detainee, and the detainee had been Elbek Tashukhadzhiyev: the commander recognised him from the photograph. Upon providing medical assistance to the wounded soldiers, the intelligence officers had placed the applicant's son either in an armoured personnel carrier or an infantry battle vehicle ("IBV") and left for Khankala, Chechnya. Elbek Tashukhadzhiyev's lorry had been driven away by a soldier.

8. After that, the applicant and the head of administration went to see the commander of the 205th brigade, General Na. Upon their request, the General ordered that the applicant, together with a group of military servicemen on three IBVs and under the command of a Captain, would drive to where the 56th brigade (*56-я бригада*) were stationed. At that location, the commander of the 56th brigade confirmed that Elbek Tashukhadzhiyev had been detained by the intelligence officers.

9. The applicant subsequently requested information about his missing son and his lorry from General Na. The commander refused to admit that

the 205th brigade had detained Elbek Tashukhadzhiyev and that his lorry had been parked at their premises.

10. Sometime later the applicant together with representatives of the military prosecutor's office visited the premises of the brigade, where they found Elbek Tashukhadzhiyev's lorry. The vehicle's registration numbers had been removed and it was being used by the brigade's servicemen.

11. In support of his application, the applicant submitted his statement and copies of correspondence received from the authorities.

2. Information submitted by the Government

12. The Government did not challenge most of the facts as presented by the applicant. With reference to the contents of the criminal investigation file, but without providing copies of the relevant documents, the Government submitted the following:

"In the morning of 9 February 1996 Elbek Tashukhadzhiyev was driving a URAL lorry with registration number 74-83 ЧИЛ from Grozny to Shali, Chechnya. In the vicinity of the villages Petropavlovskaya and Berkat-Yurt, on a cart road, he was detained by a military intelligence group from military unit no. 74814 under the command of Major A.Z. The reason for the detention was the discovery of a grenade launcher RPG-26 in Elbek Tashukhadzhiyev's vehicle and his deviation from the route indicated in his waybill."

B. The search for Elbek Tashukhadzhiyev and the investigation

1. Information submitted by the applicant

(a) Background information

13. On 15 March 1996 the military prosecutor's office of military unit no. 44662 instituted an investigation into the disappearance of Elbek Tashukhadzhiyev.

14. The investigator in charge of the criminal case, Mr Az., informed the applicant that Major A.Z. had given himself up and confessed to detaining Elbek Tashukhadzhiyev. According to the Major, he and his servicemen had allegedly seized a grenade launcher from the applicant's son and had taken him to Khankala, Chechnya. In Khankala the servicemen had been ordered to transfer Elbek Tashukhadzhiyev to the Group Directorate of the Operational Headquarters (*Группа Управления Оперативного Штаба (ГУОШ)*) in Grozny, Chechnya. On the way there Elbek Tashukhadzhiyev had jumped out of the car and ran towards the forest. He had been shot, covered with leaves and soil and left in the forest.

15. It appears that on an unspecified date the military prosecutor's office searched for Elbek Tashukhadzhiyev's body in the forest, but to no avail.

16. About two months after providing the initial statement concerning the shooting of Elbek Tashukhadzhiyev, Major A.Z. changed his statement and told the investigation that on the way to Grozny Elbek

Tashukhadzhiyev had run away into the forest and had never been seen since.

(b) The official investigation into the disappearance

17. On 15 March 1996 the military prosecutor's office of military unit no. 44662 instituted an investigation into the case of Elbek Tashukhadzhiyev under Article 103 of the Criminal Code (murder). The case was opened against Major A.Z. of military unit no. 74814. The criminal case file was given the number 14/27/0148-98.

18. On 15 September 1996 the criminal case concerning the murder of the applicant's son was terminated for a lack of *corpus delicti*. The applicant was informed about it on 17 October 1996. On an unspecified date the applicant appealed against the decision and on 30 April 1998 the proceedings were reopened (see paragraph 45 below). The applicant was not informed about the reopening of the proceedings.

19. On 4 August 1997 the military prosecutor's office of the Northern Caucasus Military Circuit replied to a complaint made by the applicant's wife and stated, *inter alia*, the following:

“... the investigation established that on 9 February 1996 your son had been detained by a military intelligence group of military unit no. 74814 ... He had fled from the servicemen on the way to the military commander's office and had been shot at. However, it is unclear whether he was killed, as nobody saw him [again]-dead or alive. The military prosecutor's office examined the relevant part of the forest and did not find any graves ...

On the basis of the above, the criminal investigation was terminated on 15 September 1996 ... It is impossible to establish your son's whereabouts ...”

20. On 6 January 1998 the military prosecutor's office of military unit no. 44662 forwarded the criminal case file to the military prosecutor's office of the Northern Caucasus Military Circuit.

21. On an unspecified date the military prosecutor's office of the Northern Caucasus Military Circuit forwarded the criminal case file to the military prosecutor's office of military unit no. 74814 in the Budennovsk military garrison.

22. On 5 July 2002 the Chechnya prosecutor's office forwarded the applicant's complaint about his son's disappearance to the Grozny district prosecutor's office.

23. On 14 July 2002 the Department of Coordination of Counterterrorist Operations of the Federal Security Service (the FSB) informed the applicant that his son Elbek Tashukhadzhiyev was not listed as a detainee of the Russian federal forces in Chechnya.

24. On 21 January 2003 the Chief Military Prosecutor's office forwarded the applicant's request for assistance in the search for his son to the military prosecutor's office of the United Group Alignment (“the UGA”).

25. On 12 September 2003 the Bureau of the Special Representative of the Russian President in Chechnya for rights and freedoms (“the Bureau”) complained to the Grozny district prosecutor’s office about the lack of information concerning the criminal investigation.

26. On 14 January 2004 the Bureau requested that the UGA military prosecutor’s office provide information about the progress of the investigation into the disappearance of the applicant’s son. The letter stated, amongst other things, the following:

“... [The applicant] complained that his son Elbek Tashukhadzhiyev together with the URAL petrol tanker ... had been detained by a military intelligence unit of the 205th brigade on 9 February 1996 ... Elbek Tashukhadzhiyev’s lorry had been found on the brigade’s premises sometime later.

On 15 March 1996 a criminal case was opened in connection with the above matter. The arguments concerning the detainee’s escape, as well as the witnesses’ statements concerning the place of his burial, are not convincing, as the witnesses have been changing their statements at every interrogation.

The applicant complained that the investigators were reluctant to establish the true circumstances surrounding the events ...”

27. On 27 January 2004 the UGA military prosecutor’s office replied to the Bureau as follows:

“... The case concerning the circumstances of Elbek Tashukhadzhiyev’s detention was investigated by the military prosecutor’s office of military unit no. 44662 within the framework of the criminal case opened against Major A.Z. of military unit no. 74614. In connection with this, in accordance with the rules of jurisdiction, the applicant’s complaint was forwarded to the military prosecutor of military unit no. 44662 in Buynaks, Dagestan ...”

28. On 26 February 2004 the military prosecutor’s office of military unit no. 44662 forwarded the applicant’s complaint to the military prosecutor’s office of the Budennovsk military garrison. The letter stated, amongst other things, the following:

“... the investigation established that on 15 March 1996 the military prosecutor’s office of military unit no. 44662 had opened an investigation under Article 103 of the Criminal Code in respect of officer Major A.Z. of military unit no. 74814. Circumstances of the case: on 11 February 1996, in Chechnya, Major A.Z. committed the murder of Elbek Tashukhadzhiyev.

On 15 September 1996 the criminal case against Major A.Z. was terminated ... for a lack of *corpus delicti*.

On 6 January 1998 the criminal case file was transferred from the military prosecutor’s office of military unit no. 44662 ... to the military prosecutor’s office of the Budennovsk military garrison (the station of military unit no. 74814) ...”

29. On 18 March 2004 the military prosecutor’s office of military unit no. 20102 informed the applicant that “in March 1996 one of the military prosecutor’s offices in the Northern Caucasus investigated a criminal case

concerning the disappearance of Elbek Tashukhadzhiyev ..." but that it had not been their office which investigated the crime.

30. On 24 March 2004 the UGA military prosecutor's office provided the applicant with similar information and stated that they had not investigated the case either.

31. On 27 March 2004 the UGA military prosecutor's office forwarded the applicant's complaint about his son's disappearance to the military prosecutor's office of military unit no. 20116.

32. On 30 April 2004 the military prosecutor's office of military unit no. 44662 informed the applicant, amongst other things, of the following:

"... it has been impossible to verify the arguments provided in [the applicant's] complaint about the murder of Elbek Tashukhadzhiyev ... for the following reasons:

In 1996 the military prosecutor's office of military unit no. 44662 was transferred from Grozny to its current station in Buynaks, Dagestan ...

Military unit no. 74814, where Major A.Z. was serving and in respect of whom the military prosecutor's office of military unit no. 44662 had opened a criminal case under Article 103 of the Criminal Code (in connection with the murder of Elbek Tashukhadzhiyev) on 15 March 1996, was stationed in Budennovsk in the Stavropol Region along with the servicemen who had witnessed the events in question ...

Taking into account that in 1998 due to well known reasons the investigation of the criminal case was impossible, it was decided to transfer the criminal case against Major A.Z. ... to the military prosecutor's office of the Budennovsk military garrison, where the suspect and the witnesses were stationed at the time ..."

33. On 13 May 2004 the military prosecutor's office of the Northern Caucasus Military Circuit informed the applicant that on an unspecified date they had requested that the military prosecutor's office of the Budennovsk military garrison provide them with the investigation file of criminal case no. 14/27/0148-98 opened against Major A.Z. of military unit no. 74814. The case file had been requested in order to examine the applicant's complaints.

34. On 15 June 2004 the military prosecutor's office of the Northern Caucasus Military Circuit informed the applicant, amongst other things, of the following:

"... the military prosecutor's office of the Budennovsk military garrison investigated the criminal case against Major A.Z. of military unit no. 74814, who was suspected of murdering Elbek Tashukhadzhiyev. It was impossible to establish Elbek Tashukhadzhiyev's whereabouts or his corpse. The criminal investigation was terminated on 10 January 2000 ..."

The letter provided neither the reasons for the termination of the criminal proceedings, nor contained a copy of the relevant decision.

35. On 3 September 2004 the Chechnya Committee for the Defence of Constitutional Rights wrote on behalf of the applicant to the Chief Military Prosecutor's Office and the UGA military prosecutor's office. The letter stated, amongst other things, the following:

“ ... this document (the letter of 15 June 2004 from the military prosecutor’s office of the Northern Caucasus Military Circuit) and other information received from the prosecutors’ offices directly point to the involvement of Major A.Z. in the detention of Elbek Tashukhadzhiyev, who disappeared following the detention ...

... we have already complained to the UGA military prosecutor’s office about the investigators’ reluctance to establish the true circumstances of the case and the investigation’s unconvincing arguments to this end ...

... It is irrefutable that the murder and the detention at the checkpoint took place ... that there was no possibility for the detained [Elbek Tashukhadzhiyev] to use any physical force against [those who detained him], in particular, against the armed men ... [Therefore] the arguments concerning the detainee’s attempts to escape are ridiculous ...”

36. On 30 November 2004 the UGA military prosecutor’s office, without enclosing a copy of the relevant decision, informed the applicant of the following:

“... on 10 January 2000 the military prosecutor’s office of the Budennovsk military garrison terminated criminal case no. 14/27/0148-98 under Article 208 § 2 of the Criminal Procedure Code [for a lack of evidence] ...”

37. On 24 December 2004 and 21 January 2005 the military prosecutor’s office of the Northern Caucasus Military Circuit replied to the applicant’s complaints about his son’s disappearance, stating that they were in the process of the examination of the contents of criminal case file no. 14/27/0148-98 and that he would be informed of the results.

38. According to the applicant, he was not granted victim status in the criminal case concerning his son’s disappearance and the investigative authorities consistently failed to provide him with information on the progress of the criminal case.

2. Information submitted by the Government

39. On 4 March 1996 Major A.Z. gave himself up and confessed to the killing of Elbek Tashukhadzhiyev. He and other witnesses showed investigators the place where they had buried the body.

40. At some later stage, Major A.Z. backtracked and stated that he had only confessed to killing Elbek Tashukhadzhiyev to improve his image before the command, as he had been responsible for Elbek Tashukhadzhiyev’s escape from the servicemen.

41. On an unspecified date the investigators searched the burial site identified by the Major and the other witnesses, but Elbek Tashukhadzhiyev’s body was not found.

42. On 8 March 1996 the investigators examined Elbek Tashukhadzhiyev’s lorry and forwarded it to the Grozny Refinery for storage.

43. On 15 March 1996 the investigators opened a criminal case against Major A.Z. under Article 103 of the Criminal Code (murder).

44. On 15 September 1996 the investigation of the criminal case was terminated for a lack of *corpus delicti* in the actions of Major A.Z.

45. On 30 April 1998 the investigation of the criminal case was reopened.

46. On 29 May 1998 and 5 January 1999 the investigation was suspended for failure to identify the perpetrators.

47. On 30 June 1998 and 18 March 1999 the investigation was resumed.

48. On 18 April 1999 the investigation of the criminal case was again terminated on account of a lack of *corpus delicti* in the actions of Major A.Z.

49. On 10 December 1999 the investigation of the criminal case was reopened.

50. On 10 January 2000 the investigation of the criminal case was terminated for failure to prove the charges against Major A.Z.

51. On 30 April 2009 the decision to terminate the criminal proceedings was overruled and the investigation was resumed.

52. On an unspecified date the investigators questioned the applicant and his wife, who stated that in 1998 they had learnt from a Mr A.Kh., who had been released from a detention centre, that their son Elbek Tashukhadzhiyev had been detained in the Lefortovo remand prison in Moscow. According to the Government, the investigation did not obtain information confirming the applicant's son's detention in that prison.

53. The Government further submitted that, although the investigation had failed to establish the whereabouts of Elbek Tashukhadzhiyev, it was still in progress and all measures provided for in domestic law were being taken to solve the crime. The applicant had been duly informed of all decisions taken during the investigation.

54. Despite specific requests by the Court, the Government did not disclose any documents from the investigation file of criminal case no. 14/27/0148-98. The Government stated that the investigation was in progress and that disclosure of the documents would be in violation of their confidentiality, since the file contained secret information.

II. RELEVANT DOMESTIC LAW

55. 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. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

56. The applicant complained under Article 2 of the Convention that his son has been deprived of his life by Russian servicemen and that the domestic authorities had failed to carry out an effective investigation into the disappearance of his son Elbek Tashukhadzhiyev. 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. Admissibility

57. In so far as the application concerned the death of the applicant’s son the Government maintained that this complaint should be declared inadmissible as it fell outside of the Court’s jurisdiction *ratione temporis*. They pointed out that the events took place in February 1996, whereas Russia had ratified the Convention in May 1998. The applicant accepted that the events took place in February 1996 but maintained that the ongoing investigation had not elucidated the circumstances of his son’s death for which reason the *ratione temporis* ground would not apply.

58. The Court notes that it is common ground between the parties that the applicant’s son was arrested in February 1996 by the military servicemen under the command of Major A.Z. However, it is unclear what happened to him afterwards. It is not for the Court to seek to establish what occurred in 1996. As the Convention entered into force in respect of Russia only in 1998 such a matter is outside the Court’s temporal jurisdiction. Furthermore, an assessment of what happened to the applicant’s son thereafter would on the basis of the available information be mere speculation.

59. In the light of this, the Court considers that it has no competence *ratione temporis* to examine the applicant’s complaint under the substantive limb of Article 2 of the Convention for which reason this part of the application must be declared inadmissible pursuant to Article 35 §§ 3 (a) and 4 of the Convention.”

60. As far as the application concerned the alleged ineffectiveness of the investigation into the applicant's son's disappearance and death, the Government considered that this part of the application was inadmissible for the applicant's failure to exhaust domestic remedies. They submitted that the applicant had failed to appeal against the decision of 10 January 2000 to terminate the criminal investigation. In addition, he failed to claim damages in civil proceedings or appeal against the investigators' other decisions to competent domestic authorities. In the alternative the Government suggested that the complaint was premature since the investigation had been resumed and was pending. Finally, the Government maintained that the applicant had failed to comply with the six-month rule, as the decision to terminate the criminal investigation had been taken in January 2000 whereas the applicant had lodged the application with the Court in August 2004.

61. The applicant contested the Government's objections. He stated that he could not have appealed against the decision of 10 January 2000 as he had not been informed about it for several years afterwards and because the authorities had failed to provide him with a copy of it. He further stated that he had not been granted victim status in the criminal case and that throughout the proceedings he had not been informed of their progress. As for a civil claim for damages, the applicant pointed out that such a remedy would not have been effective in his case in the absence of the results of the criminal investigation. He stressed that the remedy relied upon by the Government was ineffective, as he had complained about the actions of the investigative authorities to their supervisory bodies, but his complaints had been forwarded for examination to the very authorities he had complained about. Finally, he submitted that the ongoing investigation into his son's fate only showed that it was ineffective.

62. As regards the question of exhaustion of domestic remedies and turning to the Government's argument that the applicant could have sought compensation through civil proceedings, the Court observes that it has already considered this issue in a number of similar cases. It has found that, taken alone, a civil action to obtain redress for damage sustained through the allegedly illegal acts or unlawful conduct of State agents 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, §§ 119-21, 24 February 2005, and *Estamirov and Others v. Russia*, no. 60272/00, § 77, 12 October 2006). In the light of the above, the Court confirms that the applicant was not obliged to pursue a civil damages claim. The Government's objection in this regard is thus dismissed.

63. Secondly, the Government argued that the applicant had failed to appeal against the decision to terminate the criminal investigation and to appeal the investigators' other decisions to the competent domestic authorities. The applicant insisted that he had not been duly notified of the

impugned decision or of any other decisions taken by the investigators in the criminal case, and therefore that he could not have been expected to appeal against them.

64. The Court has previously held that in the Russian legal system the power of a court to reverse a decision not to institute criminal proceedings is a substantial safeguard against the arbitrary exercise of powers by the investigating authorities and therefore a remedy that must be exhausted (see *Trubnikov v. Russia* (dec.), no. 49790/99, 14 October 2003). However, an applicant does not need to exercise a remedy which, although theoretically of a nature as to constitute a remedy, does not in reality offer any chance of redressing the alleged breach (see *Gündem v. Turkey*, 22275/93, Commission decision of 9 January 1995). If the remedy chosen was adequate in theory, but, over the course of time, proved to be ineffective, the applicant is no longer obliged to exhaust it (see *Tepe v. Turkey*, 27244/95, Commission decision of 25 November 1996; see also *Mikheyev v. Russia* (dec.), no. 77617/01, 7 October 2004).

65. As to the effectiveness of the criminal remedies referred to by the Government, the Court notes that it is not clear whether the applicant had been indeed granted victim status in the criminal proceedings. However, setting aside the issue, the Court notes that, in any case, the applicant had not been duly and timely informed of the decision of 10 January 2000 (see paragraphs 34 and 36 above) or of any other procedural decision taken by the investigators. From the documents submitted it does not appear that the authorities took any steps to provide the applicant with any meaningful information about the progress of the criminal proceedings and copies of the relevant decisions. It is highly doubtful that the applicant had a realistic possibility of challenging any decisions of the investigative authorities without having such essential information.

66. In such circumstances, the Court dismisses the Government's objection in so far as it concerns the applicant's failure to appeal against the actions and decisions of the investigative authorities and, in particular, against the decision of 10 January 2000.

67. Finally, in relation to the Government's argument concerning the effectiveness of the ongoing criminal investigation, the Court considers that this objection should be joined to the merits and falls to be examined below under the substantive provision of the Convention.

68. As regards the question of applying the six-month rule, the Court has already stated that the six-month time-limit does not apply as such to continuing situations (see, for example, *Agrotexim Hellas S.A. and Others v. Greece*, no. 14807/89, Commission decision of 12 February 1992, DR 71, p. 148, and *Cone v. Romania*, no. 35935/02, § 22, 24 June 2008). The reason for this is that if there is a situation of ongoing breach, the time-limit in effect starts afresh each day and it is only once the situation ceases that the final period of six months will run to its end.

69. In the present case the impugned decision concerning the termination of the criminal investigation was taken on 10 January 2000. From the documents submitted it can be seen that the applicant was informed about this fact only on 15 June 2004 (see paragraph 34). He lodged his application with the Court on 5 August 2004. Furthermore, the Court notes from the information submitted by the Government that on 30 April 2009 the decision to terminate the criminal proceedings was overruled and the investigation was resumed (see paragraph 51 above).

70. In such circumstances, the Court rejects the Government's objection concerning the applicant's failure to comply with the six-month rule.

71. Thus, as regards the issue of the admissibility of the applicant's complaint concerning the alleged ineffectiveness of the criminal investigation under the procedural limb of Article 2, 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.

72. Therefore, the complaint under the procedural limb of Article 2 of the Convention must be declared admissible, no other reasons for declaring it inadmissible having been established.

B. The merits

1. The parties' submissions

73. The Government submitted that Elbek Tashukhadzhiyev had been arrested on 9 February 1996 as his vehicle had deviated from the route stated in his waybill and that as a result of a subsequent search a grenade launcher had been discovered in his vehicle. The arrest had been conducted under the President's Order "On measures concerning the suppression of the activities of illegal armed groups in Chechnya" of 9 December 1994 and the relevant provisions of the Criminal Code. The Government further stated that during the transportation of Elbek Tashukhadzhiyev to the military commander's office, he had jumped out of the vehicle and had run towards the forest. The military servicemen had shot at him, but neither his corpse, nor he himself had been subsequently found, as he had managed to escape. The Government further contended that the domestic investigation had obtained no evidence to the effect that Elbek Tashukhadzhiyev was dead or that any servicemen had been responsible for his disappearance. The Government claimed that the investigation into the disappearance of the applicant's son had met the Convention's requirement of effectiveness.

74. The applicant maintained that it was beyond reasonable doubt that the servicemen under the command of Major A.Z. had detained his son Elbek Tashukhadzhiyev who had subsequently disappeared. In support of his complaint he referred to the fact that the domestic investigation had confirmed the detention of Elbek Tashukhadzhiyev by the military

servicemen (see paragraphs 19, 28, 32 and 34 above) and that all the other information disclosed by the authorities had supported his assertion as to the responsibility of the State agents for the disappearance of Elbek Tashukhadzhiyev. The applicant further argued that the authorities had failed to conduct an effective and thorough investigation into the fate of his missing son who had disappeared in life-threatening circumstances.

2. *The Court's assessment*

75. 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).

76. The Court would emphasise that the procedural obligation under Article 2 operates independently of the substantive obligation. A disappearance is a distinct phenomenon, characterised by an ongoing situation of uncertainty and unaccountability and is very often drawn out over time, prolonging the torment of the victim's relatives and giving rise to a continuing situation (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, §§ 147 and 148, 18 September 2009). Thus, the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation. This is so, even where death may, eventually, be presumed and even if this death had occurred prior to the ratification of the Convention by the respondent state (see *Varnava*, cited above, § 194).

77. In the present case, the fate of Elbek Tashukhadzhiyev was investigated. The Court must assess whether that investigation met the requirements of Article 2 of the Convention.

78. The Court notes at the outset that none of the documents from the investigation were disclosed by the Government. It therefore has to assess the effectiveness of the investigation on the basis of the few documents submitted by the applicant and the general information about its progress presented by the Government.

79. In addition, the Court observes that the Government failed to provide detailed information on the actual investigative steps taken by the authorities. However, from the scarce information in its possession, the Court notes the following. The investigation into Elbek Tashukhadzhiyev's disappearance was opened more than a month after the incident and it was subsequently terminated on several occasions – 15 September 1996, 18 April 1999 and 10 January 2000 – and reopened on 30 April 1998,

10 December 1999 and 30 April 2009 (see paragraphs 43-45 and 48-51 above). Taking into account the Government's reluctance to provide information concerning the grounds for the various decisions to reopen the proceedings, the Court infers that the decisions to terminate the criminal investigation were overruled as unsubstantiated. This factor in itself – and the overall fourteen year timeframe of the currently ongoing criminal proceedings – demonstrates the ineffectiveness of the investigation into Elbek Tashukhadzhiyev's disappearance.

80. The Court also notes that even though it is not clear from the documents submitted whether the applicant was granted victim status in the criminal case, it is clear from the copies of the letters received by him from the authorities that he was deprived of any meaningful information concerning the progress of the investigation. Accordingly, the investigators failed to ensure that the investigation received the required level of public scrutiny, or to safeguard the interests of the next of kin in the proceedings.

81. In the light of the foregoing, the Court rejects the Government's objection as to the exhaustion of domestic remedies due to the pending investigation and holds that the authorities failed to carry out an effective criminal investigation into the circumstances surrounding the disappearance of Elbek Tashukhadzhiyev, in breach of the procedural aspect of Article 2.

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

82. The applicant stated that Elbek Tashukhadzhiyev 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. Admissibility

83. The Government did not make a separate submission under this head. However, they stated in general terms that Elbek Tashukhadzhiyev had been arrested on the suspicion of unlawful possession of firearms and that his arrest had complied with domestic legislation (see paragraph 73 above).

84. The applicant reiterated the complaint.

85. 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.

B. Merits

86. The Court reiterates that it is not in dispute that the applicant’s son was arrested by military servicemen and subsequently disappeared. The authorities acknowledged his arrest, but they have not provided any documentary evidence giving official trace of his whereabouts afterwards. The Court notes the obvious disregard of the procedural safeguards applicable to the detention of persons. While there is no evidence that Elbek Tashukhadzhiyev was still in detention in the period under the Court’s consideration, it remains incumbent on the domestic authorities to show that they have since carried out an effective investigation into the arguable claim that he had been taken into custody and not seen subsequently (see, amongst many authorities, *Kurt v. Turkey*, 25 May 1998, § 124, *Reports of Judgments and Decisions* 1998-III and *Varnava*, cited above, § 208). The Court’s findings above in relation to Article 2 leave no doubt that the authorities have also failed to conduct the requisite investigation in that regard. This discloses a continuing violation of Article 5.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

87. The applicant complained that under national law he had been barred from filing a civil claim to obtain compensation for his son’s unlawful detention or death pending the outcome of the criminal investigation. He relied on Article 6 § 1 of the Convention, the relevant parts of which provide:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

A. Admissibility

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

B. Merits

89. The Court finds that the applicant's complaint under Article 6 concerns essentially the same issues as those discussed above in relation to the procedural aspect of Article 2 and below in relation to Article 13. It should also be noted that the applicant submitted no information which would prove his stated intention to apply to a domestic court with a claim for compensation. In such circumstances, it finds that no separate issues arise under Article 6 of the Convention (for a similar situation see *Bazorkina*, cited above, § 153).

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION IN CONJUNCTION WITH ARTICLES 2 AND 5 OF THE CONVENTION

90. The applicant complained that he had been deprived of an effective remedy 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. Admissibility

91. The Government contended that the applicant had had effective remedies at his disposal as required by Article 13 of the Convention and that the authorities had not prevented him from using them. They stated that the applicant had had the opportunity to challenge the acts or omissions of the investigating authorities in court and to lodge civil claims for damages.

92. The applicant reiterated the complaint.

93. 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.

B. Merits

94. The Court reiterates that in circumstances where, as in the present case, 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 obligations under Article 13 of the Convention (see *Khashiyev and Akayeva*, cited above, § 183).

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

96. As regards the applicant's reference to Article 5 of the Convention, the Court considers that, in the circumstances, no separate issue arises in respect of Article 13 read in conjunction with Article 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).

V. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

97. The applicant complained that he had been discriminated against in the enjoyment of his Convention rights because the violations of which he complained had taken place because he was resident in Chechnya and because of his ethnic background as a Chechen. This 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.”

98. The Court finds that no evidence has been submitted to it that suggests that the applicant was treated differently due to his ethnic background or place of residence.

99. It follows that this part of the application should be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

100. 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

101. The applicant claimed damages in respect of expenses incurred by him and his family in connection with the search for his disappeared son. The applicant claimed a total of 900,000 Russian roubles (RUB) under this heading (about 22,500 euros (EUR)), stating that the amount was approximate as his religious beliefs and traditions precluded him from keeping a record of the expenses.

102. The Government stated that this claim should be rejected as completely unsubstantiated.

103. In the absence of any documents substantiating the applicant's claim for pecuniary damage, the Court does not make any award under this head.

B. Non-pecuniary damage

104. As for non-pecuniary damage, the applicant left the determination of any amount for the Court.

105. The Government stated that the finding of a violation would be adequate just satisfaction in the applicant's case.

106. The Court has found a violation of Articles 2, 5 and 13 of the Convention. The Court thus accepts that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by finding violations. It awards to the applicant EUR 30,000, plus any tax that may be chargeable to him thereon.

C. Costs and expenses

107. The applicant did not submit any claims under this head.

D. Default interest

108. The Court considers it appropriate that 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

1. *Decides* unanimously to join to the merits the Government's objection as to non-exhaustion of domestic remedies due to the pending investigation and rejects it;
2. *Declares* by a majority the complaints under the procedural aspect of Article 2 of the Convention, as well as the complaints under Articles 5, 6 and 13 of the Convention admissible and the remainder of the application inadmissible;
3. *Holds* unanimously 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 Elbek Tashukhadzhiyev disappeared;
4. *Holds* by 6 votes to 1 that there has been a violation of Article 5 of the Convention in respect of Elbek Tashukhadzhiyev;
5. *Holds* unanimously that no separate issues arise under Article 6 of the Convention;
6. *Holds* unanimously that there has been a violation of Article 13 of the Convention in conjunction with Article 2 of the Convention;
7. *Holds* unanimously that no separate issues arise under Article 13 of the Convention in conjunction with Article 5 of the Convention;
8. *Holds* unanimously
 - (a) that the respondent State is to pay to the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 30,000 (thirty thousand euros), in respect of non-pecuniary damage, to be converted into Russian roubles at the date of settlement plus any tax that may be chargeable 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;
9. Dismisses unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 25 October 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Nina Vajić
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Judge Kovler is annexed to this judgment.

N.A.V.
S.N.

PARTLY DISSENTING OPINION OF JUDGE KOVLER

I cannot share the conclusions of the Court as regards the admissibility of the complaint under Article 5 of the Convention and the violation of that provision in this case.

Taking into account the Court’s findings concerning the substantive limb of Article 2 of the Convention in respect of the presumed death of Elbek Tashukhadzhiyev prior to the ratification of the Convention by the respondent State (5 May 1998), I conclude that his detention for a number of hours in February 1996 before his presumed death also falls outside the Court’s competence *ratione temporis*. I cannot accept the finding of “a continuing violation” of Article 5 (see paragraph 86 of the judgment), founded on a formalistic interpretation of the Varnava test. It follows for me that the Court is not competent to examine whether the applicant had an “arguable claim” of a breach of a substantive Convention right (see, among other authorities, *Voroshilov v. Russia* (dec.), no. 21501/02, 8 December 2005, and *Meriakri v. Moldova* (dec.), no. 53487/99, 16 January 2001).