



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

FIRST SECTION

CASE OF SHAIPOVA AND OTHERS v. RUSSIA

(Application no. 10796/04)

JUDGMENT

STRASBOURG

6 November 2008

FINAL

06/02/2009

This judgment may be subject to editorial revision.

In the case of Shaipova and Others v. Russia,

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

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Khanlar Hajiyeu,

Dean Spielmann,

Sverre Erik Jebens,

Giorgio Malinverni, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 16 October 2008,

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

PROCEDURE

1. The case originated in an application (no. 10796/04) 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 five Russian nationals listed below (“the applicants”), on 9 February 2004.

2. The applicants, who had been granted legal aid, were represented by Mr D. Itslayev, a lawyer practising in Nazran. The Russian Government (“the Government”) were represented by Ms V. Milinchuk, former Representative of the Russian Federation at the European Court of Human Rights.

3. On 1 September 2005 the Court decided to apply Rule 41 of the Rules of Court.

4. On 7 May 2007 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

5. The Government objected to the joint examination of the admissibility and merits of the application. Having considered the Government’s objection, the Court dismissed it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants are:

- (1) Ms Tamara Daliyevna Shaipova, born in 1953;
- (2) Ms Yakhita Musayevna Shaipova, born in 1974;
- (3) Mr Ramzan Akhmedovich Shaipov, born in 1995;
- (4) Mr Askhab Akhmedovich Shaipov, born in 1998; and
- (5) Mr Magomed Akhmedovich Shaipov, born in 2002.

They live in the town of Urus-Martan in the Chechen Republic.

7. The first applicant is the mother of Mr Akhmed Musayevich Shaipov, born in 1972. Akhmed Shaipov was married to the second applicant; they are the parents of the third, fourth and fifth applicants.

A. Abduction of Akhmed Shaipov

1. The applicants' account

8. On the night of 8 to 9 April 2003 the applicants and Akhmed Shaipov were in their family house at 79 Sportivnaya Street, Urus-Martan.

9. At about 2.30 a.m. on 9 April 2003 Akhmed Shaipov went to the courtyard for a smoke and then hastily returned inside the house. He told the second applicant that he had heard a noise. The second applicant stepped outside into the courtyard and saw a group of armed men wearing camouflage uniforms coming in the direction of their house. She went back into the house and awakened her sister-in-law, Ms Petimat Shaipova, and the first applicant. Akhmed Shaipov went to his bedroom.

10. Meanwhile a large group of armed men entered the applicants' courtyard; they sat there for six or seven minutes. Then around ten of them broke into the applicants' house. They were armed with machine guns, some of which were equipped with silencers, and wore masks. The applicants saw through holes in the masks that the men had blue eyes and Slavic features. The armed men spoke Russian without an accent. The applicants inferred that they were Russian federal servicemen.

11. Without identifying themselves, the servicemen ordered the applicants to turn the light on and searched the house. When they entered the room where Akhmed Shaipov was sleeping, they woke him up and took him into the corridor. There the servicemen forced Akhmed Shaipov to the floor. One of them pressed his knee against Akhmed Shaipov's back and pointed a machine gun at him. The armed men told the Shaipov women that they were carrying out a routine check and demanded that they produce

Akhmed Shaipov's identity papers. Having examined the papers, the men tied Akhmed Shaipov's arms behind his back and plastered his mouth with adhesive tape, while some of the servicemen sent the applicants back to their rooms and leaned against the doors to stop them leaving.

12. The servicemen took Akhmed Shaipov out of the house. He was barefoot; the servicemen allowed him to put on a pair of running shoes and then blindfolded him. The whole group left the applicants' courtyard.

13. The first and second applicants rushed out into the street and asked neighbours if anyone had seen their relative. Some witnesses noticed that the armed men had led Akhmed Shaipov in the direction of the centre of Urus-Martan via Sovetskaya Street in which two Russian federal troops' checkpoints were based. The applicants submitted to the Court relevant witness statements and plans of their neighbourhood as evidence.

2. Information submitted by the Government

14. At about 3 a.m. on 9 April 2003 unidentified men wearing camouflage uniforms and masks and armed with machine guns kidnapped Akhmed Shaipov from the house at 79 Sportivnaya Street, Urus-Martan.

B. The search for Akhmed Shaipov and the investigation

1. The applicants' account

15. In the morning of 9 April 2003 the first applicant visited the head of the local administration and asked him to help find her son. On the same date she also applied to the prosecutor's office of the Urus-Martan District ("the district prosecutor's office").

16. In quest of Akhmed Shaipov, the applicants contacted, both in person and in writing, various official bodies, such as the military commander of the Urus-Martan District, the Urus-Martan district department of the interior, the Special Envoy of the Russian President in the Chechen Republic for Rights and Freedoms and the prosecutors' offices at different levels. In their complaints they constantly referred to the circumstances of Akhmed Shaipov's abduction and requested assistance in establishing his whereabouts and fate. They also sent requests concerning their relative to penitentiary institutions, but to no avail. The applicants retained copies of a number of those complaints and submitted them to the Court.

17. On 12 May 2003 the district prosecutor's office instituted an investigation into the disappearance of Akhmed Shaipov under Article 126 § 2 (aggravated kidnapping) of the Russian Criminal Code, assigned the case number 34055 and informed the first applicant accordingly.

18. On 19 May 2003 the prosecutor's office of the Chechen Republic forwarded the first applicant's complaint to the district prosecutor's office.

19. On 1 July 2003 the district prosecutor's office granted the first applicant victim status in case no. 34055.

20. On 12 July 2003 the district prosecutor's office suspended the investigation in case no. 34055 for failure to identify those responsible.

21. On 31 July 2003 the first applicant requested the district prosecutor's office to admit her to the proceedings in case no. 34055 as a victim and to inform her of progress in the investigation into her son's kidnapping by servicemen of law enforcement agencies. Shortly after that she was provided with a copy of the decision of 1 July 2003.

22. At the end of July 2003 the first applicant received a copy of the decision on suspension of the investigation dated 12 July 2003.

23. On 4 August 2003 the first applicant wrote to the prosecutor's office of the Chechen Republic alleging that her son had been apprehended by servicemen of law enforcement agencies. In support of her allegations she submitted that Akhmed Shaipov had been detained by around fifty men who had moved freely about the town past curfew and had not been stopped at two federal checkpoints. The first applicant requested the prosecutor's office of the Chechen Republic to order the district prosecutor's office to resume the investigation in case no. 34055 and take the requisite investigative measures.

24. On 18 August 2003 the prosecutor's office of the Chechen Republic forwarded the first applicant's complaint to the district prosecutor's office and requested that all investigative measures necessary to solve the crime be taken and the perpetrators be identified.

25. On 12 November 2003 the first applicant complained to the Russian Prosecutor General about ineffectiveness of the investigation into her son's kidnapping by "servicemen of federal law enforcement agencies". She submitted in particular that the district prosecutor's office and the prosecutor's office of the Chechen Republic had not taken the requisite measures to verify the alleged federal servicemen's implication in the crime, requesting that the investigators' inactivity be declared unlawful and that the proceedings be resumed.

26. On 27 November 2003 the prosecutor's office of the Chechen Republic informed the first applicant that "on 13 December 2003 the acting prosecutor of the Urus-Martan District [had] quashed the decision on suspension of the preliminary investigation" into Akhmed Shaipov's kidnapping and that investigative measures were being taken to solve the crime.

27. On 16 April 2004 the Urus-Martan Town Court of the Chechen Republic upon the second applicant's request declared Akhmed Shaipov missing as from 9 April 2003.

28. On 11 November 2005 the first applicant requested the district prosecutor's office to resume the investigation and to grant her access to the investigation file.

29. On 18 November 2005 the district prosecutor's office dismissed the first applicant's request in part and stated that pursuant to domestic law a victim could only study records of investigative measures taken in his or her presence.

30. On 30 March 2006 the first applicant again requested the district prosecutor's office to allow her access to the investigation file. She was informed that she could study the documents related only to the investigative measures taken with her participation.

31. On 18 December 2006 the first applicant requested the district prosecutor's office to resume the investigation in case no. 34055 if it had been suspended.

32. On 15 January 2007 the first applicant requested the district prosecutor's office to admit her to the criminal proceedings as a civil party and claimed the amount of 5,000,000 Russian roubles in respect of non-pecuniary damage. On 23 January 2007 her request was granted.

2. Information submitted by the Government

33. On 12 May 2003 the district prosecutor's office instituted an investigation into Akhmed Shaipov's abduction under Article 126 § 2 of the Russian Criminal Code (aggravated kidnapping). The case file was assigned number 34055.

34. On an unspecified date the crime scene was inspected, but this brought no positive results.

35. On 14 May 2003 the first applicant was questioned as a witness. She submitted that at about 2.50 a.m. unknown armed men in camouflage uniforms and masks had entered her house, handcuffed her son and taken him outside. Then they had blindfolded Akhmed Shaipov with adhesive tape and taken him away. The following morning she had found footprints on the road that had been left by her son's running shoes; they had led her to the town centre of Urus-Martan where the military commander's office of the Urus-Martan District had been located. She had talked to a serviceman of the military commander's office and he had advised her to file an application with law enforcement agencies. Her son had not participated in any illegal armed groups.

36. On 16 May 2003 the second applicant was questioned. She submitted that at about 3.50 a.m. on 9 April 2003 unknown armed men in camouflage uniforms and masks had entered her house and searched it. They had checked her husband's identity papers, handcuffed him, taken him outside and blindfolded him. In the morning she and her mother-in-law had followed the footprints of her husband's running shoes and visited the

military commander's office. Akhmad Shaipov had not been a member of illegal armed groups.

37. On 21 May 2003 the investigators requested information concerning Akhmed Shaipov and any special operations involving his arrest from the prosecutors' offices of various towns and districts of the Chechen Republic. According to the replies received, Akhmed Shaipov had not been under criminal investigation; neither had he been kept in temporary detention facilities.

38. On 1 July 2003 the first applicant was granted victim status and questioned. She repeated her statement of 14 May 2003.

39. On 11 July 2003 the military prosecutor's office of military unit no. 20102 informed the investigators that the military commander's office of the Urus-Martan District and military units under its control had not carried out any special operations on 8 and 9 April 2003 in the Urus-Martan District.

40. On 12 July 2003 the district prosecutor's office suspended the investigation in case no. 34055 for failure to find those responsible.

41. On 27 August 2003 the military commander's office of the Urus-Martan District informed the investigators that they had not detained Akhmed Shaipov and had no information on his whereabouts.

42. On 13 December 2003 the district prosecutor's office resumed the investigation for the reason that it had been incomplete.

43. On 20 December 2003 the second applicant was questioned and submitted the following. Those who had kidnapped her husband had been armed with machine guns without butt stocks and fitted with silencers, together with grenade launchers. All the men had been masked; three or four of them had been wearing dark-blue running shoes with white stripes. The men had been wearing khaki uniforms. They had mentioned no names while conversing amongst themselves. In 2000 the second applicant had found out that her husband had been taking drugs. He had borrowed a lot of money from unknown persons.

44. On 20 December 2003 a witness stated that Akhmed Shaipov had been a drug-addict. He had not had any connections with Wahabees and his family had not been involved in any feud.

45. On 21 December 2003 the first applicant was questioned and submitted that her son had been unemployed and that he had been taking drugs since 1994. He had borrowed money from different persons unknown to the first applicant. Those persons had often visited their household.

46. On 21 December 2003 Akhmad Shaipov's father was questioned. He submitted that he had not been at home on the night of his son's abduction. He had disapproved of his son's lifestyle because the latter had borrowed money and had not repaid his debts.

47. On 22 December 2003 the father of an acquaintance of Akhmad Shaipov was questioned and submitted that he did not know where his son was or whether he had been in contact with Akhmad Shaipov.

48. On 23 December 2003 the district prosecutor's office suspended the investigation.

49. On 23 January 2004 the department of the interior of the Urus-Martan District informed the investigators that investigative measures taken to find Akhmed Shaipov had so far been fruitless; that they had no information concerning Akhmed Shaipov's participation in illegal armed groups. Akhmed Shaipov had not been kept in the temporary detention facility. He had not applied for medical help in any hospitals. His body had not been found among unidentified corpses.

50. The departments of the Federal Security Service, the penitentiary facilities IZ-20/1 and IZ-20/2 and other law enforcement agencies submitted that they had not detained Akhmed Shaipov and had no information on him.

51. On 18 November 2005 the district prosecutor's office quashed the decision of 23 December 2003 and resumed the proceedings. They stated that it was necessary to carry out a number of investigative measures, for instance, to order that law enforcement agencies take steps to identify the perpetrators, to collect recommendations concerning Akhmad Shaipov, and to send requests to penitentiary facilities of the Southern Federal Circuit, as well as to question witnesses and Akhmad Shaipov's relatives.

52. On 21 November 2005 the investigators requested information on Akhmed Shaipov's arrest from all departments of the interior in the Chechen Republic. From the replies received it followed that no criminal proceedings against Akhmed Shaipov had been pending and that he had not been detained in temporary detention facilities.

53. The information centre of the Russian Ministry of the Interior submitted that in 2001 Akhmed Shaipov had been convicted of drug trafficking and sentenced to nine months' imprisonment and that he had served his sentence. No other criminal proceedings against him had been pending.

54. On 5 December 2005 the first applicant was questioned and submitted that in 2001 Akhmad Shaipov had been convicted of drug trafficking. Her other son had fought the federal troops and had been killed in the course of the anti-terrorism campaign.

55. On 18 December 2005 the district prosecutor's office suspended the investigation.

56. On 18 January 2007 an investigator of the district prosecutor's office accepted the investigation in case no. 34055.

57. On 18 February 2007 the investigation was suspended.

58. On 31 March 2007 the district prosecutor's office resumed the proceedings in case no. 34055.

59. On 1 May 2007 the investigation was suspended and the first applicant was informed accordingly.

60. On 17 May 2007 the district prosecutor's office resumed the investigation and then suspended it on 17 June 2007.

61. On 19 and 29 May 2007 the investigators questioned the applicants' neighbours, Ms and Mr I., respectively. Both witnesses submitted that they had not seen anyone on the night of Akhmed Shaipov's kidnapping and learned of it from the applicants some time in April 2003.

62. On 23 July 2007 the Russian Ministry of Defence submitted that it had no information on any special operations allegedly carried out in Urus-Martan on 8 and 9 April 2003.

63. The investigation failed to establish the whereabouts of Akhmed Shaipov but was not completed. The investigating authorities sent requests for information to the competent State agencies and took other steps to have the crime solved. The investigation found no evidence to support the involvement of law enforcement agencies in the crime.

64. The Government further submitted that the investigating authorities were taking measures to verify whether persons involved in drug trafficking had been implicated in Akhmed Shaipov's kidnapping.

65. Despite specific requests by the Court the Government did not disclose most of the contents of the investigation file in case no. 34055, providing only copies of decisions to suspend and resume the investigation and to grant victim status, as well as of several notifications to the relatives. Relying on the information obtained from the Prosecutor General's Office, the Government stated that the investigation was in progress and that disclosure of the documents would be in violation of Article 161 of the Code of Criminal Procedure, since the file contained information of a military nature and personal data concerning the witnesses or other participants in the criminal proceedings.

II. RELEVANT DOMESTIC LAW

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

THE LAW

I. THE GOVERNMENT'S OBJECTION REGARDING ABUSE OF THE RIGHT OF PETITION

67. The Government submitted that the application had not been lodged in order to restore the allegedly violated rights of the applicants. The actual object and purpose of the application was clearly political as the applicants wanted to “incriminate the Russian Federation [for] allegedly adopting [a] policy infringing upon human rights in the Chechen Republic”. They concluded that there had been an abuse of the right of petition on the part of the applicants and that the application should be dismissed pursuant to Article 35 § 3 of the Convention.

68. The Court observes that the complaints the applicants brought to its attention concerned their genuine grievances. Nothing in the case file reveals any appearance of abuse of their right of individual petition. Accordingly, the Government's objection must be dismissed.

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

A. The parties' submissions

69. The Government contended that the complaint should be declared inadmissible for non-exhaustion of domestic remedies. They submitted that the investigation of the disappearance of Akhmed Shaipov had not yet been completed. They further argued that it had been open to the applicants to challenge in court or before higher prosecutors any actions or omissions of the investigating or other law enforcement authorities, but that the applicants had not availed themselves of that remedy. They also argued that it had been open to the applicants to lodge with courts civil claims for damage caused by actions and omissions of the investigators, but they had failed to do so.

70. The applicants contested that objection. They stated that the criminal investigation had proved to be ineffective and that they had not been obliged to apply to civil courts in order to exhaust domestic remedies.

B. The Court's assessment

71. The Court reiterates that the rule of exhaustion of domestic remedies under Article 35 § 1 of the Convention obliges applicants to use first the

remedies which are available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain both in theory and in practice, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 also requires that complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used. However, there is no obligation to have recourse to remedies which are inadequate or ineffective (see *Aksoy v. Turkey*, 18 December 1996, §§ 51-52, *Reports of Judgments and Decisions* 1996-VI; *Akdivar and Others v. Turkey*, 16 September 1996, §§ 65-67, *Reports of Judgments and Decisions* 1996-IV *Akdivar and Others*; and, most recently, *Cennet Ayhan and Mehmet Salih Ayhan v. Turkey*, no. 41964/98, § 64, 27 June 2006).

72. It is incumbent on the respondent Government claiming non-exhaustion to indicate to the Court with sufficient clarity the remedies to which the applicants have not had recourse and to satisfy the Court that the remedies were effective and available in theory and in practice at the relevant time, that is to say that they were accessible, were capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *Akdivar and Others*, cited above, p. 1211, § 68, or *Cennet Ayhan and Mehmet Salih Ayhan*, cited above, § 65).

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

74. As regards a civil action to obtain redress for damage sustained through the alleged illegal acts or unlawful conduct of State agents, the Court has already found in a number of similar cases that this procedure alone cannot be regarded as an effective remedy in the context of claims brought under Article 2 of the Convention. A civil court is unable to pursue any independent investigation and is incapable, without the benefit of the conclusions of a criminal investigation, of making any meaningful findings regarding the identity of the perpetrators of fatal assaults or disappearances, still less of establishing their responsibility (see *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, §§ 119-121, 24 February 2005). In the light of the above, the Court confirms that the applicants were not obliged to pursue civil remedies.

75. As regards criminal law remedies provided for by the Russian legal system, the Court observes that the applicants complained to the law enforcement authorities shortly after the kidnapping of Akhmed Shaipov and that an investigation has been pending since 12 May 2003. The

applicants and the Government dispute the effectiveness of the investigation into the kidnapping.

76. The Court considers that the Government's objection raises issues concerning the effectiveness of the investigation which are closely linked to the merits of the applicants' complaints under Article 2. Thus, it considers that these matters fall to be examined below.

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

A. The parties' arguments

77. The applicants maintained that it was beyond reasonable doubt that the men who had taken away Akhmed Shaipov had been State agents. In support of their complaint they referred to the following facts. The perpetrators had been wearing military uniforms, had Slavic features and spoke Russian without an accent, which proved that they were not of Chechen origin. Their machine guns had been equipped with silencers used by security forces. The armed men had moved freely around Urus-Martan past curfew; on their way to the centre of Urus-Martan they must have passed two military checkpoints. The authorities had taken no measures to find and arrest the perpetrators. The applicants had recognised the footprints left by their relative's running shoes, because no one had walked over those footprints at an early hour. Russian servicemen could have worn running shoes to make less noise when walking. The applicants also pointed out that the ground given for the Government's refusal to submit the file in criminal case no. 34055 was that it contained "information of a military nature disclosing the location and nature of actions by military and special security forces".

78. The Government submitted that the Russian authorities had no reasons to apprehend Akhmed Shaipov. He could have been a victim of vengeance by drug dealers to whom he had owed money, or he could also have staged his kidnapping to escape such vengeance. It was doubtful that the prints of running shoes seen by the first and second applicants had been left by Akhmed Shaipov, because some of the perpetrators had worn running shoes as well and that type of shoe had been quite popular among Urus-Martan residents. Moreover, State agents on a mission could not wear running shoes because that would be a breach of military rules on dress-code; accordingly, the kidnappers were not federal servicemen. They further contended that the investigation into the incident was pending, that there was no evidence that the armed men had been State agents and that there were therefore no grounds for holding the State liable for the alleged violations of the applicants' rights. They further pointed out that groups of

Ukrainian, Belorussian and ethnic Russian mercenaries had committed crimes in the territory of the Chechen Republic and emphasised that the fact that the perpetrators had Slavic features and spoke Russian did not prove their attachment to the Russian military. They also observed that a considerable number of armaments had been stolen by illegal armed groups from Russian arsenals in the 1990s and that anyone could purchase masks and camouflage uniforms. In sum, the Government insisted that involvement of State agents in Akhmed Shaipov's kidnapping had not been proven beyond reasonable doubt.

B. The Court's evaluation of the facts

79. In cases where there are conflicting accounts of events, the Court is inevitably confronted when establishing the facts with the same difficulties as those faced by any first-instance court. When, as in the instant case, the respondent Government have exclusive access to information able to corroborate or refute the applicants' allegations, any lack of cooperation by the Government without a satisfactory explanation may give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations (see *Taniş and Others v. Turkey*, no. 65899/01, § 160, ECHR 2005-...).

80. The Court points out that a number of principles have been developed in its case-law as regards cases where it is faced with the task of establishing facts on which the parties disagree. As to the facts that are in dispute, the Court reiterates its jurisprudence requiring the standard of proof "beyond reasonable doubt" in its assessment of 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 *Taniş and Others*, cited above, § 160).

81. The Court is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see, for example, *McKerr v. the United Kingdom* (dec.), no. 28883/95, 4 April 2000). Nonetheless, where allegations are made under Articles 2 and 3 of the Convention, the Court must apply a particularly thorough scrutiny (see, *mutatis mutandis*, *Ribitsch v. Austria*, 4 December 1995, § 32, Series A no. 336; and *Avşar*, cited above, § 283) even if certain domestic proceedings and investigations have already taken place.

82. The Court reiterates that it has noted the difficulties for applicants to obtain the necessary evidence in support of allegations in cases where the respondent Government are in possession of the relevant documentation and fail to submit it. Where the applicant makes out a *prima facie* case and the

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

83. The Court notes that despite its requests for a copy of the investigation file concerning the abduction of Akhmed Shaipov, the Government produced only a part of the material from the investigation file. The Government referred to Article 161 of the Code of Criminal Procedure. The Court observes that in previous cases it has already 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-... (extracts)).

84. The Court has found the Russian State authorities responsible for extra-judicial executions or disappearances of civilians in the Chechen Republic in a number of cases, even in the absence of final conclusions from the domestic investigation (see *Khashiyev and Akayeva*, cited above; *Luluyev and Others v. Russia*, no. 69480/01, ECHR 2006-... (extracts); *Estamirov and Others v. Russia*, no. 60272/00, 12 October 2006; *Imakayeva*, cited above; and *Baysayeva v. Russia*, no. 74237/01, 5 April 2007). It has done so primarily on the basis of witness statements and other documents attesting to the presence of military or security personnel in the area concerned at the relevant time. It has relied on references to military vehicles and equipment, on witness accounts, on other information on security operations and on the undisputed effective control of the areas in question by the Russian military. On that basis, it has concluded that the areas in question were “within the exclusive control of the authorities of the State” in view of military or security operations being conducted there and the presence of servicemen (see, *mutatis mutandis*, *Akkum v. Turkey*, cited above, § 211; and *Zubayrayev v. Russia*, no. 67797/01, § 82, 10 January 2008).

85. However, in the present case the Court has little evidence on which to draw such conclusions. The applicants submitted that the kidnappers had been armed, spoke Russian and wore camouflage uniforms. It was not alleged that they had used military vehicles, such as armoured personnel carriers. The mere fact that the armed men’s machine guns were equipped with silencers does not necessarily prove that the men were State servicemen. The camouflage uniform that they were wearing bore none of the insignia that should normally appear on uniforms of State agents. It appears that silencers and camouflage uniforms with no insignia could have

been obtained by persons not belonging to the military via various, possibly illegal channels. According to the applicants, the perpetrators spoke Russian fluently; however, lack of accent does not necessarily show that they were Russian servicemen. Some of the kidnappers wore running shoes, which do not normally form part of the regular uniform of any Russian law enforcement agencies. There are no witness statements confirming that Akhmed Shaipov was seen being brought to the military commander's office or any other State agency after his abduction. The applicants' assertion that they identified footprints from their relative's running shoes and followed them to the centre of Urus-Martan has been rather vague and unsubstantiated. The Court is not persuaded that the first and second applicants could so easily identify with a naked eye the footprints left by a pair of running shoes with no distinctive marks. Furthermore, given that the perpetrators used no vehicles and walked, they could have moved around the town unbeknownst to servicemen at military checkpoints with greater ease than, for example, groups of armed men riding in an armoured personnel carrier. Accordingly, the information at the Court's disposal does not suffice to establish that the perpetrators belonged to the security forces or that a security operation had been carried out in respect of Akhmed Shaipov.

86. At the same time the Court takes into account the Government's submission that the crime could have been committed by drug dealers with whom Akhmed Shaipov had allegedly had certain connections. In such circumstances, the Court cannot attribute responsibility for the unlawful acts in the present case to the respondent State without additional evidence to that effect.

87. To sum up, it has not been established to the required standard of proof "beyond reasonable doubt" that the security forces were implicated in the kidnapping of Akhmed Shaipov; nor does the Court consider that the burden of proof can be entirely shifted to the Government.

IV. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

88. The applicants complained under Article 2 of the Convention that their relative had disappeared after having been detained by Russian servicemen and that the domestic authorities had failed to carry out an effective investigation into 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

89. The Government contended that the domestic investigation had obtained no evidence to the effect that Akhmed Shaipov was dead or that any servicemen of federal law enforcement agencies had been involved in his kidnapping or alleged killing. The Government claimed that the investigation into the kidnapping of the applicants’ relative met the Convention requirement of effectiveness, as all measures envisaged in national law were being taken to identify the perpetrators.

90. The applicants argued that Akhmed Shaipov had been detained by State servicemen and should be presumed dead in the absence of any reliable news of him for five years. The applicants also argued that the investigation had not met the requirements of effectiveness and adequacy, as required by the Court’s case-law on Article 2. The applicants invited the Court to draw conclusions from the Government’s unjustified failure to submit the documents from the case file to them or to the Court.

B. The Court’s assessment

1. Admissibility

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

2. Merits

(a) The alleged violation of Akhmed Shaipov’s right to life

92. The Court reiterates that Article 2, which safeguards the right to life and sets out the circumstances in which 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, §§ 146-47, Series A no. 324 and *Avşar*, cited above, § 391).

93. As noted above, the domestic investigation failed to produce any tangible results as to the identities of the persons who committed the kidnapping. The applicants did not submit persuasive evidence to support their allegations that State agents were the perpetrators of the crime. The Court has already found above that, in the absence of relevant information, it is unable to find that security forces were implicated in the kidnapping of the applicants' relative (see paragraph 87 above). Neither has it established "beyond reasonable doubt" that Akhmed Shaipov was deprived of his life by State agents.

94. In such circumstances the Court finds no State responsibility, and thus no violation of the substantive limb of Article 2 of the Convention.

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

95. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, *McCann and Others*, cited above, § 161; and *Kaya v. Turkey*, 19 February 1998, § 86, *Reports of Judgments and Decisions* 1998-I). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. This investigation should be independent, accessible to the victim's family, carried out with reasonable promptness and expedition, effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances or otherwise unlawful, and afford a sufficient element of public scrutiny of the investigation or its results (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, §§ 105-09, ECHR 2001-III (extracts); and *Douglas-Williams v. the United Kingdom* (dec.), no. 56413/00, 8 January 2002).

96. The Court notes that there is no proof that Akhmed Shaipov has been killed. However, it reiterates that the above-mentioned obligations also apply to cases where a person has disappeared in circumstances which may be regarded as life-threatening (see *Toğcu*, cited above, § 112). The applicants informed the investigating authorities that Akhmed Shaipov had been kidnapped by a large group of unknown armed men. Given a

considerable number of reported enforced disappearances of persons in the Chechen Republic and enduring confrontation between illegal armed groups and federal troops in the region in the early 2000s, the Court considers that the disappearance of Akhmed Shaipov could be regarded as life-threatening. Furthermore, after a certain lapse of time during which no information on the fate of the missing man had been received, both the applicants and investigators could have presumed that he had been deprived of his life at the hands of the kidnappers. Accordingly, the Court concludes that the State authorities were under a positive obligation to investigate the crime in question.

97. Given that there was an investigation into the kidnapping of Akhmed Shaipov, the Court must now assess whether it met the requirements of Article 2 of the Convention.

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

99. The Court notes that the authorities were immediately made aware of the crime by the applicants' submissions. The investigation in case no. 34055 was instituted on 12 May 2003, that is, more than a month after Akhmed Shaipov's abduction. Such a delay *per se* was liable to affect the investigation into the kidnapping in life-threatening circumstances, where crucial action has to be taken in the first days after the event. Furthermore, it transpires from the documents submitted to the Court that at least several investigative measures were unreasonably delayed (see paragraphs 42 and 51 above). Moreover, it remains unclear whether they have ever been taken at all. 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 *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 86, ECHR 2002-II).

100. The Court also notes that even though the first applicant was eventually granted victim status in case no. 34055, she was only informed of the suspension and resumption of the proceedings, and not of any other significant developments. Her requests for access to the investigation file were constantly rejected. 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.

101. Finally, the Court notes that the investigation in case no. 34055 was suspended and resumed six times and that there were lengthy periods of

inactivity on the part of the district prosecutor's office. For instance, no proceedings were pending between 23 December 2003 and 18 November 2005, nor between 18 December 2005 and 18 January 2007.

102. The Government mentioned the possibility for the applicants to apply for judicial review of the decisions of the investigating authorities, in the context of the exhaustion of domestic remedies. The Court observes that the applicants, having no access to the case file and not being properly informed of the progress of the investigation, could not have effectively challenged actions or omissions of investigating authorities before a court. Furthermore, taking into account the fact that the effectiveness of the investigation had already been undermined in its early stages by the authorities' failure to take necessary and urgent investigative measures, it is highly doubtful that the remedy in question would have had any prospects of success. Accordingly, the Court finds that the remedy relied on by the Government was ineffective in the circumstances and dismisses their preliminary objection as regards the applicants' failure to exhaust domestic remedies in the context of the criminal investigation.

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

V. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

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

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

A. The parties' submissions

105. The Government disagreed with these allegations and argued that the investigation had not established that the applicants had been subjected to inhuman or degrading treatment prohibited by Article 3 of the Convention and that the State was not responsible for the applicants' mental distress.

106. The applicants maintained their submissions.

B. The Court's assessment

107. Referring to its settled case-law, the Court reiterates that, where a person has been abducted by State security forces and subsequently disappeared, his or her relatives can claim to be victims of treatment contrary to Article 3 of the Convention on account of their mental distress caused by the “disappearance” of their family member and the authorities’ reactions and attitudes to the situation when it is brought to their attention (see, among many other authorities, *Kurt v. Turkey*, 25 May 1998, §§ 130-34, *Reports of Judgments and Decisions* 1998-III; and *Timurtaş v. Turkey*, no. 23531/94, §§ 96-98, ECHR 2000-VI).

108. Turning to the circumstances of the present case, the Court notes that the applicants are close relatives of Akhmed Shaipov. Accordingly, it has no doubt that the applicants have indeed suffered from grave emotional distress following the kidnapping of their son, husband and father.

109. The Court recalls that it has already found violations of Article 3 of the Convention in respect of relatives of missing persons in a series of cases concerning the phenomenon of “disappearances” in the Chechen Republic (see, for example, *Luluyev and Others*, cited above, §§ 117-18; *Khamila Isayeva v. Russia*, no. 6846/02, § 143-45, 15 November 2007; and *Kukayev v. Russia*, no. 29361/02, §§ 107-10, 15 November 2007). It is noteworthy, however, that in those cases the State was found to be responsible for the disappearance of the applicants’ relatives. In the present case, by contrast, it has not been established to the required standard of proof “beyond reasonable doubt” that the Russian authorities were implicated in Akhmed Shaipov’s kidnapping (see paragraph 87 above). In such circumstances the Court considers that this case is clearly distinguishable from those mentioned above and therefore concludes that the State cannot be held responsible for the applicants’ mental distress caused by the commission of the crime itself.

110. Furthermore, in the absence of a finding of State responsibility for Akhmed Shaipov’s kidnapping, the Court is not persuaded that the investigating authorities’ conduct, although negligent to the extent that it has breached Article 2 in its procedural aspect, could have in itself caused the applicants mental distress in excess of the minimum level of severity which is necessary in order to consider treatment as falling within the scope of Article 3 (see, among other authorities, *Cruz Varas and Others v. Sweden*, 20 March 1991, § 83, Series A no. 201).

111. It follows that this part of the application is manifestly ill-founded and should be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

112. The applicants further stated that Akhmed Shaipov had been detained in violation of the guarantees of Article 5 of the Convention, which reads, in so far as relevant:

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

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

...

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

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

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

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

A. The parties' submissions

113. In the Government's opinion, no evidence was obtained by the investigators to confirm that Akhmed Shaipov had been deprived of his liberty by State agents in breach of the guarantees set out in Article 5 of the Convention.

114. The applicants reiterated the complaint.

B. The Court's assessment

115. The Court has previously noted the fundamental importance of the guarantees contained in Article 5 to secure the right of individuals in a democracy to be free from arbitrary detention. It has also stated that unacknowledged detention is a complete negation of these guarantees and discloses a very grave violation of Article 5 (see *Çiçek v. Turkey*,

no. 25704/94, § 164, 27 February 2001; and *Luluyev and Others*, cited above, § 122).

116. Nevertheless, the Court has not found it established “beyond reasonable doubt” that Akhmed Shaipov was apprehended by Russian servicemen (see paragraph 87 above). Similarly, it cannot presume that upon his kidnapping the missing man was placed in unacknowledged detention under the control of State agents.

117. The Court therefore considers that this part of the application should be dismissed as being incompatible *ratione personae* and must be declared inadmissible in accordance with Article 35 §§ 3 and 4 of the Convention.

VII. ALLEGED VIOLATIONS OF ARTICLE 8 OF THE CONVENTION

118. The applicants alleged that the intrusion by Russian servicemen into their house on 9 April 2003 had infringed their right to respect for their home. They also complained under the same head that their right to respect for family life had been breached as a result of Akhmed Shaipov’s abduction. They relied in this respect on Article 8 of the Convention, which provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

“2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

119. The Court reiterates that, according to its above findings, it has not been proven that the armed men who intruded into the applicants’ home on 9 April 2003 and kidnapped their relative were State agents (see paragraph 87 above). It thus concludes that the State cannot be held liable for the alleged violation of the applicants’ rights guaranteed by Article 8 of the Convention.

120. The Court therefore considers that this part of the application should be dismissed as being incompatible *ratione personae* and must be declared inadmissible in accordance with Article 35 §§ 3 and 4 of the Convention.

VIII. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

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

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

122. The Government contended that the applicants had had effective remedies at their disposal as required by Article 13 of the Convention and that the authorities had not prevented them from using those remedies. The applicants had had an opportunity to challenge the actions or omissions of the investigating authorities before higher prosecutors or courts. They could also submit a claim for non-pecuniary damage caused by unlawful actions of investigating authorities.

123. The applicants reiterated the complaint.

124. The Court observes that the complaint made by the applicants under this Article has already been examined in the context of Article 2 of the Convention. Having regard to the findings of a violation of Article 2 under its procedural head (see paragraph 87 above), the Court considers that, whilst the complaint under Article 13 taken in conjunction with Article 2 is admissible, there is no need to make a separate examination of this complaint on its merits (see, *mutatis mutandis*, *Makaratzis v. Greece* [GC], no. 50385/99, §§ 84-86, ECHR 2004-XI, and *Anik and Others v. Turkey*, no. 63758/00, § 86, 5 June 2007).

IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

125. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

126. The applicants did not submit any claims for pecuniary damage. As regards non-pecuniary damage, the first and second applicants claimed 40,000 euros (EUR) each, while the third, fourth and fifth applicants claimed EUR 20,000 each in respect of non-pecuniary damage for the suffering they had endured as a result of the loss of their family member, the indifference shown by the authorities towards them and the failure to provide any information about the fate of their close relative.

127. The Government considered the amounts claimed to be exaggerated.

128. The Court has found a violation of Article 2 in its procedural aspect. It thus accepts that the applicants have suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. It finds it appropriate to award the applicants EUR 6,000 jointly

in respect of non-pecuniary damage, plus any tax that may be chargeable thereon.

B. Costs and expenses

129. The applicants claimed costs for legal representation at the rate of EUR 80 per hour, EUR 5,390 in total. They also claimed administrative expenses in the amount of EUR 366 and translation fees in the amount of EUR 552.

130. The Government contested those claims as unfounded.

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

132. Having regard to the details of the information, the Court is satisfied that these rates are reasonable and reflect the expenses actually incurred by the applicants' representative.

133. Further, it has to be established whether the costs and expenses incurred for legal representation were necessary. The Court notes that this case was rather complex and required a certain amount of research and preparation. It notes at the same time, that, owing to the application of Article 29 § 3 in the present case, the applicants' representative submitted the observations on admissibility and merits in one set of documents. Furthermore, the case involved little documentary evidence, in view of the Government's refusal to submit most of the case file. The Court thus doubts that legal drafting was necessarily time-consuming to the extent claimed by the representative.

134. Having regard to the details of the claims submitted by the applicants, the Court finds it appropriate to award the applicants' representatives EUR 5,000, less EUR 850 received by way of legal aid from the Council of Europe.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's objection regarding abuse of the right of petition;

2. *Decides* to join to the merits the Government's objection as to non-exhaustion of criminal domestic remedies and rejects it;
3. *Declares* the complaints under Articles 2 and 13 of the Convention admissible and the remainder of the application inadmissible;
4. *Holds* that there has been no violation of Article 2 of the Convention in its substantive limb in respect of Akhmed Shaipov;
5. *Holds* that there has been a violation of Article 2 of the Convention in respect of the failure to conduct an effective investigation into the circumstances in which Akhmed Shaipov disappeared;
6. *Holds* that no separate issues arise under Article 13 of the Convention in respect of the alleged violation of Article 2;
7. *Holds*
 - (a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts to the applicants jointly:
 - (i) EUR 6,000 (six thousand euros) in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement, plus any tax that may be chargeable on that amount;
 - (ii) EUR 4,150 (four thousand one hundred and fifty euros) in respect of costs and expenses, to be converted into Russian roubles at the rate applicable at the date of settlement, plus any tax that may be chargeable to the applicants on that amount;
 - (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;
8. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 6 November 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President