



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

FIRST SECTION

CASE OF BERSUNKAYEVA v. RUSSIA

(Application no. 27233/03)

JUDGMENT

STRASBOURG

4 December 2008

FINAL

05/06/2009

This judgment may be subject to editorial revision.

In the case of Bersunkayeva v. Russia,

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

Christos Rozakis, *President*,

Anatoly Kovler,

Elisabeth Steiner,

Khanlar Hajiyeu,

Dean Spielmann,

Sverre Erik Jebens,

Giorgio Malinverni, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 13 November 2008,

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

PROCEDURE

1. The case originated in an application (no. 27233/03) 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, Mrs Raisa Shamayevna Bersunkayeva (“the applicant”), on 10 July 2003.

2. The applicant was represented by lawyers of the Memorial Human Rights Centre (Moscow) and the European Human Rights Advocacy Centre (London). The Russian Government (“the Government”) were represented first by Mr P. Laptev and then by Ms V. Milinchuk, both former Representatives of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that her son had disappeared following his unacknowledged detention and that there had been no adequate investigation into the matter. She also claimed that she had suffered mentally on account of these events and complained of the lack of effective remedies in respect of those violations. She relied on Articles 2, 3, 5 and 13 of the Convention.

4. On 29 August 2004 the President of the First Section decided to grant priority to the application under Rule 41 of the Rules of Court.

5. By a decision of 10 July 2007 the Court declared the application admissible.

6. The applicant and the Government each filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1954 and lives in Urus-Martan, the Chechen Republic.

A. The facts

8. At the material time the applicant worked in the administration of the Urus-Martan District (*администрация Урус-Мартановского района*, “the Urus-Martan administration”) and lived in an apartment in a block of flats in Urus-Martan. She had a son, Mr Artur Bersunkayev, born in 1979, who lived at the time with the applicant’s brother-in-law, Mr Ayndi Bersunkayev, and the latter’s family, in a privately owned house at 51 Partizanskaya Street, Urus-Martan.

1. *Detention of Artur Bersunkayev*

(a) The applicant’s version

9. The applicant did not witness the apprehension of her son and her account was based on statements by her brother-in-law and his wife, Mrs Layla Tsugayeva.

10. On 13 June 2001, at around 4 a.m., a group of men arrived at 51 Partizanskaya Street and attempted to break down the door of the house. When Mrs Tsugayeva opened the door, about six men entered the house. They were wearing camouflage uniforms and masks and had machine-guns and portable transmitters.

11. The men did not introduce themselves or produce any documents to authorise their actions. They locked Mrs Tsugayeva in one of the rooms and ordered the applicant’s brother-in-law and her son to lie down. The men hit Ayndi and Artur Bersunkayev with their machine-guns and then tied the latter’s hands and covered his eyes and mouth with adhesive tape. It appears that the applicant’s son lost consciousness and the military poured some water on his head so that he came around.

12. The servicemen interrogated the applicant’s brother-in-law and her son, putting their questions very rapidly. They enquired whether Ayndi and Artur Bersunkayev were relatives and then demanded that the applicant’s brother-in-law confess and reveal where he kept firearms, and why he provided shelter to terrorists. Ayndi Bersunkayev answered that he was Artur’s uncle, had no firearms and did not provide shelter to terrorists. He also stated that only his family and nephew lived in his house.

13. The servicemen searched the house and found Ayndi Bersunkayev's old hunting rifle, which was damaged and unfit for shooting. They seized it without furnishing the applicant's brother-in-law with any relevant document. Thereafter the officer in command of the group told Ayndi Bersunkayev that they had come to the wrong address and would leave. Then the applicant's brother-in-law was allowed to go to his room and get dressed. When he returned to the corridor his nephew was no longer there.

14. One of the soldiers looked into the room in which Mrs Tsugayeva was locked, and asked her whether she was a relative to Ayndi and Artur Bersunkayev. When she answered, the soldier told her that they would not take her husband but would take Artur Bersunkayev.

15. Thereafter the commanding officer ordered his group to leave, having stated that they "had been mistaken" and would not "take anyone or anything". The officer also ordered Ayndi Bersunkayev to stay inside the house for 10 minutes after the servicemen's departure, having warned that otherwise a sniper would shoot him. Nevertheless, the applicant's brother-in-law attempted to follow the military, but they threatened him with their firearms. He returned home and found out that the applicant's son had disappeared. Ayndi Bersunkayev ran into the street, but the military were already gone. Later that day the applicant's brother-in-law talked to a number of neighbours who, according to him, stated that they had seen a "Ural" vehicle and an armoured personnel carrier ("APC") parked in Partizanskaya Street and two servicemen forcing Artur Bersunkayev into the APC.

16. Artur Bersunkayev's relatives have had no news of him since.

17. According to the applicant's brother-in-law and his wife, the men who raided their house were members of the federal forces, since they spoke Russian without an accent and had military vehicles at their disposal. The applicant also submitted an eye-witness statement by a neighbour of her brother-in-law, who had confirmed that he had seen Russian servicemen in a "Ural" military vehicle not far from the house of the Bersunkayev family on the night of the incident, and that he had subsequently mentioned this fact during his interview at the Urus-Martan prosecutor's office.

(b) The Government's version

18. According to the Government, on 13 June 2001, during the night, "unidentified men in masks and camouflage uniforms armed with automatic firearms abducted Mr A. Bersunkayev from his home. The latter's whereabouts remain unknown".

2. The applicant's search for Artur Bersunkayev

19. On 13 June 2001, at 5.45 a.m., the applicant's brother-in-law arrived at the applicant's apartment and notified her of her son's detention. They immediately went to the place of residence of an official of the Urus-Martan

administration and asked for assistance. The latter replied that it was too early in the morning and advised the applicant to wait until 9 a.m.

20. The applicant also visited at home the deputy head of the Urus-Martani administration who also suggested that she should wait until the beginning of the working day.

21. At 9 a.m. the applicant arrived at the Urus-Martani administration and talked to the head of the administration, stating the facts of her son's disappearance and asking for assistance. According to the applicant, the latter gave her no definite answer.

22. The applicant then applied to the deputy head of the Urus-Martani administration. The latter telephoned the temporary office of the interior of the Urus-Martani District (*временный отдел внутренних дел Урус-Марта́новского района*, "the Urus-Martani VOVD") and enquired about the applicant's son. The Urus-Martani VOVD confirmed that, during the night on 13 June 2001, twelve persons, including Artur Bersunkayev, had been apprehended and were currently being held at the Urus-Martani Division of the Chechen Department of the Federal Security Service of Russia (*Урус-Марта́новский отдел Управления Федеральной службы безопасности РФ по Чеченской Республике*, "the Urus-Martani Division of the FSB").

23. The applicant also applied in person to the military commander of the Urus-Martani District (*военный комендант Урус-Марта́новского района*). She stated that her son's arrest had been unlawful, that he had never participated in military operations, and that during the hostilities in Chechnya in 1994 – 1996 and 1999 – 2000 their family had left Chechnya and had only returned in June 2000. According to the applicant, the military commander confirmed that her son had been detained and also stated that his capture had been planned for a week. He then assured the applicant that the matter would be cleared up.

24. According to the applicant, during the next three days various officials of the Urus-Martani administration repeatedly confirmed that Artur Bersunkayev was being detained at the Urus-Martani Division of the FSB and would be released after a security check.

25. On 15 June 2001 the head of one of the divisions of the Urus-Martani administration told the applicant that her son would be released the next day and delivered home, but she would have to take him out of town. However, Artur Bersunkayev was never released and apparently disappeared.

26. After 15 June 2001, in reply to the applicant's repeated queries, the officials of the Urus-Martani administration repudiated their former statements and claimed that they had no information about Artur Bersunkayev.

27. According to the applicant, on several occasions she attempted to apply in person to the military commander of the Urus-Martani District, but

the latter only invited her to lodge written requests, which remained unanswered.

28. In the applicant's submission, a week after the detention of her son she again talked to the head of the Urus-Martan administration. The latter told her that, prior to being detained, Artur Bersunkayev had been seen talking to one of the relatives of the former head of the district administration who had held that position when the former President of Chechnya, Aslan Maskhadov, had been in government.

29. Since 13 June 2001 the applicant has repeatedly applied in person and in writing to various public bodies, including prosecutors at different levels, district and regional military commanders, local and regional administrative authorities of Chechnya, the Federal Security Service of Russia, the Plenipotentiary Representative of the Russian President in the Southern Federal Circuit (*Полномочный представитель Президента РФ в Южном федеральном округе*), the Special Envoy of the Russian President in Chechnya for Rights and Freedoms (*Специальный представитель Президента Российской Федерации по соблюдению прав и свобод человека в Чеченской Республике*) and the President of Russia. In her letters to the authorities the applicant referred to the facts of her son's abduction and asked for assistance and details of the investigation. Most of these enquiries remained unanswered, or only formal responses were given by which her requests were forwarded to various prosecutor's offices "for examination".

3. *Official investigation*

30. On 18 June 2001 the applicant filed a written complaint about her son's apprehension with the Urus-Martan prosecutor's office. The latter received and registered the applicant's complaint on 19 June 2001.

31. On 28 June 2001 the Urus-Martan prosecutor's office commenced a criminal investigation into the disappearance of Artur Bersunkayev under Article 126 (2) of the Criminal Code of Russia (kidnapping of two or more persons by a group using firearms). The file was assigned the number 25082.

32. On 21 August 2001 the prosecutor's office of the Chechen Republic (*прокуратура Чеченской Республики*, "the republican prosecutor's office") referred the applicant's complaint concerning the abduction of her son to the Urus-Martan prosecutor's office "for investigation".

33. On 29 August 2001 the office of the Plenipotentiary Representative of the Russian President in the Southern Federal Circuit transmitted the applicant's application to the republican prosecutor's office.

34. On 19 June 2002 the applicant requested the Urus-Martan prosecutor's office to grant her the status of victim of a crime and inform her of the developments in criminal case no. 25082. In her submission, that request remained unanswered.

35. According to the applicant, early in October 2002 she accessed the file in case no. 25082 and found a letter dated 15 June 2001. In this letter an investigator of the Urus-Martan Division of the FSB requested the head of the Urus-Martan VOVD to order an expert examination of a pistol and cartridges that had been seized from Artur Bersunkayev.

36. On 2 October 2002 the applicant requested that the investigator in charge be replaced for his failure to take any investigative measures and inform her of the developments in the case. That request was refused.

37. On 17 December 2002 the Rostov Department of the FSB informed the applicant that her application had been forwarded to the Chechen Department of the FSB.

38. In a letter of 16 January 2003 the FSB of Russia stated that the Urus-Martan Division of the FSB had not detained Artur Bersunkayev on 13 June 2001 and had never taken any investigative measures in his respect. As regards the applicant's reference to the letter of 15 June 2001 signed by a FSB officer, the FSB of Russia advised her to address her queries about that issue to the Urus-Martan prosecutor's office.

39. On 22 January 2003 the Head of the Urus-Martan Division of the FSB informed the applicant that his subordinates had not arrested her son, had not taken any action in Urus-Martan during the night of 13 June 2001 and had no information as to Artur Bersunkayev's whereabouts. He further stated that the investigator who had signed the letter of 15 June 2001 had resigned, and therefore it was impossible to verify whether he had indeed ordered an expert examination of the pistol allegedly seized from her son.

40. In a letter of 12 February 2003 the Urus-Martan Division of the FSB again informed the applicant that their personnel had never detained her son or brought criminal proceedings against him. The letter continued that on 7 June 2001 Artur Bersunkayev had voluntarily delivered the pistol in question, which had then been subjected to an expert examination with the result that the investigator in charge had taken the decision to dispense with criminal proceedings against him.

41. On 14 March 2003 the republican prosecutor's office notified the applicant that the criminal proceedings in criminal case no. 25082 instituted on 28 June 2001 had been suspended on 15 January 2003 for failure to identify those responsible and then resumed on 25 February 2003. The term of the preliminary investigation had been extended until 25 March 2003.

42. In May 2003, in an undated letter, the Urus-Martan prosecutor's office informed the applicant that the criminal proceedings in case no. 25082 had been resumed, but that no culprits had been identified so far. The letter further stated that the prosecutor's office had no authority to conduct a search for a missing person, that being the task of the police, and that therefore the applicant should forward her further requests to have her son's location established to the Urus-Martan VOVD.

43. On 23 May 2003 the republican prosecutor's office, in reply to the applicant's query, informed her that on 14 February 2002 criminal case no. 25082 instituted in connection with the abduction of her son had been joined with two other criminal cases and given the number 24071. On the same date the criminal proceedings were suspended, as it had been impossible to identify the alleged perpetrators. On 22 May 2003 the criminal proceedings were resumed and at present the investigation and search for Artur Bersunkayev and the culprits were in progress.

44. On 12 August 2003 the Southern Federal Circuit Department of the Prosecutor General's Office (*Управление Генеральной Прокуратуры РФ в Южном федеральном округе*) referred the applicant's application to the republican prosecutor's office. The latter invited the applicant to address her queries to the Urus-Martan prosecutor's office.

45. By a decision of 18 September 2003 the Urus-Martan prosecutor's office admitted the applicant as a victim to the criminal proceedings in case no. 25082 instituted in connection with the abduction of her son, Artur Bersunkayev, by "unidentified individuals wearing camouflage uniforms and masks and armed with automatic firearms".

46. On 9 July 2004 the military prosecutor of military unit no. 20102 (*военная прокуратура – военная часть 20102*) informed the applicant that no involvement of federal servicemen in the abduction or detention of her son had been established.

47. On 6 August 2004 the applicant requested the Urus-Martan prosecutor's office to authorise her access to the file in the criminal case concerning the abduction of her son.

48. On 9 August 2004 the Urus-Martan prosecutor's office refused the applicant's request, having stated that under national law she was only entitled to read the case file after the termination of the preliminary investigation, and that at present the investigation into the abduction of Artur Bersunkayev had been suspended since the alleged perpetrators could not be found.

49. On 19 May 2005 the applicant requested the Urus-Martan prosecutor's office to resume the proceedings in case no. 25082 and to allow her access to the case file.

50. On 2 June 2005 the Urus-Martan prosecutor's office rejected the applicant's request in a letter similar to that of 9 August 2004.

51. Referring to the information provided by the Prosecutor General's Office, the Government submitted that the applicant's written complaint concerning the abduction of her son had been received by the Urus-Martan prosecutor's office on 19 June 2001 and the criminal proceedings in the above connection had been instituted on 28 June 2001 under Article 126 of the Russian Criminal Code (kidnapping). Since then they had been suspended on 28 August and 10 November 2001, 25 March and 30 August 2003, 11 April, 23 June, 10 August and 28 November 2004 and 19 August

2005 and resumed on 10 October 2001, 20 November 2002, 15 January and 27 July 2003, 11 March, 22 June, 9 August and 28 October 2004, 19 July and 22 October 2005 respectively, but had failed to identify those responsible so far.

52. The Government further submitted that the investigating authorities had granted the status of victim to the applicant, but failed to specify the date. According to them, the applicant had been questioned on 30 June and 18 October 2001 and then at some point in late 2005. During her interview, the applicant had stated that, following her son's apprehension, she had found out from the head of the local administration that he was being held in the Urus-Martan Division of the FSB and would be released three days later. She had also talked to Mr G., the military commander of the Urus-Martan District, who had said that her son had been taken away by officers of the FSB. Mr G. had also stated that "they had been hunting Artur Bersunkayev for some time and had finally captured him". Later the officials had denied that they had ever detained her son.

53. According to the Government, apart from the applicant, the investigating authorities had also questioned several witnesses, including the applicant's relatives and neighbors, and a number of public officials who had worked in the Chechen Republic at the material time. The witnesses were mostly questioned between 2003 and 2005. The applicant's relatives had confirmed the circumstances of Artur Bersunkayev's arrest. In the Government's submission, "some of the witnesses indeed confirmed that they had seen a "Ural" military vehicle with servicemen near the house of the Bersunkayev family, but that was long before the alleged abduction" of Artur Bersunkayev.

54. The Government indicated that during his interview the head of the Urus-Martan Division of the FSB, Mr K., had stated that he had known Artur Bersunkayev since April 2001 as an active member of illegal armed groups, who had been involved in planting landmines and shelling federal military convoys. According to Mr K., on 18 April 2001 the applicant's son, armed with a pistol and grenade, had participated in an armed clash in the grounds of the Urus-Martan hospital, but had avoided arrest. Thereafter the authorities had contacted his parents and requested them to persuade Artur Bersunkayev to abandon illegal armed groups, "which had brought positive results". According to Mr K., the Urus-Martan Division of the FSB had never detained the applicant's son, and Mr K. had no information as to which State agency could have detained him.

55. The Government further submitted that the head of the Urus-Martan administration, Mr Ya., had stated during his interview that he had found out about Artur Bersunkayev's detention from officials of the administration and that he had not witnessed the applicant's conversation with military commander G. The deputy head of the Urus-Martan administration, Mr M.G., had submitted during questioning that on 13 June 2001 the

applicant had informed him of her son's detention and asked for his assistance. On the same day he had called the military commander's office and a duty officer had confirmed that Artur Bersunkayev had indeed been detained, but on the next day military commander G. had repudiated that information. Mr A., a senior investigator of the Chechen Department of the FSB, who had worked in Urus-Martan at the material time, had stated during questioning that on 7 June 2001 military commander G. had sought his assistance in formally registering the fact of the voluntary surrender of a pistol by Artur Bersunkayev. Mr A. had carried out necessary procedural actions to that end and had taken the decision to dispense with criminal proceedings against the applicant's son. According to Mr A., no procedural decisions depriving the applicant's son of his liberty had ever been taken. According to the Government, it was impossible to question military commander G., as he had been killed in a terrorist attack on 29 November 2001, but that "written information had been received from him" to the effect that he had had no information regarding Artur Bersunkayev's detention.

56. In the Government's submission, the investigation had obtained information that a pistol had been seized from Artur Bersunkayev prior to his disappearance, namely on 7 June 2001, and that the pistol had been sent to the expert office of the Urus-Martan VOVD for a study on 15 June 2001. The experts had studied the pistol on 17 June 2001 and drawn up a report stating that the pistol and cartridges of 9 mm calibre had been fit for shooting.

57. The Government also referred to statements by senior officers of the law-enforcement agencies of the Urus-Martan District or the adjacent districts, the military commander's office of the Urus-Martan District and the Urus-Martan Division of the FSB to the effect that their personnel had not instituted criminal proceedings against, or detained, the applicant's son and had no information as to his whereabouts. The applicant's son had not been kept in any of the pre-trial detention centres in the Chechen Republic or the neighbouring regions.

58. Lastly, the Government submitted that on several occasions the investigating authorities had requested district prosecutor's offices of the Chechen Republic and the military prosecutor's office of military unit no. 20102 to take the steps necessary to establish Artur Bersunkayev's whereabouts, but he has remained missing ever since.

4. Proceedings against officials

(a) The applicant's complaint about her son's detention

59. On 31 December 2002 the applicant lodged a complaint against officials of the Urus-Martan Division of the FSB with the Urus-Martan Town Court ("the Town Court"). She claimed that her son had disappeared

after having been arrested by FSB officers, referring to the letter of 15 June 2001 to support this allegation. The applicant sought to have her son's whereabouts established and have him released.

60. On 3 March 2003 the applicant further applied to the Supreme Court of the Chechen Republic, complaining about the unlawful detention of her son and the Town Court's failure to examine her complaint of 31 December 2002.

61. On 19 March 2003 the Supreme Court of the Chechen Republic transmitted the applicant's complaint to the Town Court.

62. On 16 March 2004 the Town Court dismissed the applicant's complaint against the officers of the Urus-Martan Division of the FSB, having noted that there was no evidence of their involvement in the abduction of her son.

63. On 21 April 2004 the Supreme Court of the Chechen Republic upheld the first-instance judgment on appeal.

(b) The applicant's complaints against the Urus-Martan prosecutor's office

64. On 6 July 2005 the applicant applied to the Town Court, complaining about the investigating authorities' refusal to allow her to study the file of the investigation into her son's disappearance and to make copies of the relevant documents. She also challenged the decision suspending the investigation and complained that the investigating authorities had not taken the necessary measures to solve the crime.

65. By a decision of 1 August 2005 the Town Court granted the applicant's complaint in part and ordered the Urus-Martan prosecutor's office to give the applicant access to the case file. It also noted that the proceedings in criminal case no. 25082 had already been resumed on 19 July 2005.

66. On 17 October 2005 the applicant again applied to the Town Court, complaining that the investigator in charge had prohibited her from making copies of the documents from the case file, or even from taking written notes.

67. On 11 November 2005 the Town Court rejected the applicant's complaint. This decision was upheld on appeal by the Supreme Court of the Chechen Republic on 7 December 2005.

5. The applicant's access to the file of the criminal investigation

68. On 13 and 14 December 2005 the applicant was given access to the file of criminal case no. 25082, pursuant to the Town Court's decision of 1 August 2005. She was not allowed to make any photocopies or to take written notes, but, in her submission, she managed to memorise the contents of a number of documents.

69. According to the applicant, the case file comprised 300 pages. The numbering of some of the pages had been amended, in particular, page

number 135 had been amended to 130, and page number 156 had been amended to 143.

70. While studying the case file the applicant came across a number of documents which, in her view, confirmed the involvement of the Russian security agencies in her son's disappearance. In particular, in a letter dated 15 June 2001 the investigator of the Urus-Martan Division of the FSB requested the head of the Urus-Martan VOVD to order an expert examination of a pistol and cartridges that had been seized from Artur Bersunkayev.

71. The expert office of the Urus-Martan VOVD replied on 16 June 2001 that the pistol and cartridges in the amount of 16 pieces were fit for use and that bullet shells and cartridges seized at the scenes of crimes committed in Urus-Martan, which had remained unsolved, had not been shot from the said pistol. The experts also stated that it had been impossible to find out whether any shots had been fired from the pistol in question since they did not have the chemicals necessary to carry out such a test.

72. In a letter of 6 November 2001 the deputy prosecutor of the Chechen Republic requested the head of the Chechen Department of the FSB to forward them the file of the case instituted in connection with the abduction of the applicant's son, stating that "the fact of the implication of the Urus-Martan Division of the FSB in Artur Bersunkayev's abduction has been established".

73. The applicant also came across a number of witness statements. In particular, the deputy head of the Urus-Martan Division of the FSB, Mr K., stated that the applicant's son had been a member of illegal armed groups, had participated in causing explosions and had planted landmines. The deputy head of the Urus-Martan administration stated that he had talked to military commander G. in an attempt to assist the applicant in finding her son. At first the military commander had acknowledged the fact of Artur Bersunkayev's detention, but on the next day he had repudiated his statement. One of the neighbours of the applicant's brother-in-law stated that he had seen Russian servicemen and a military vehicle in the vicinity of Partizanskaya Street. Another neighbour stated that he had seen a "Ural" military vehicle near his house in the evening of 12 June 2001.

74. According to a transcript of an interview with a former investigator of the Urus-Martan Division of the FSB, Mr A., on 17 June 2001 he had taken the decision to dispense with criminal proceedings against the applicant's son, given that the latter had voluntarily ceded the pistol. Mr A. stated that he had not personally seen Artur Bersunkayev or taken a pistol from him, but rather had helped military commander G. to draw up a report attesting the surrender of the pistol. Mr A. also stated that all the relevant material in that connection had been taken by military commander G. According to Mr A., no decisions had been taken to deprive the applicant's son of his liberty.

75. In the applicant's submission, the investigator in charge had repeatedly asked a number of witnesses, including officials of the local administration, whether Artur Bersunkayev had been involved in illegal armed activities. All of the witnesses confirmed that they had never heard that the applicant's son had been involved in any such activities.

76. In the case file the applicant also found two letters inviting military commander G. to report to the Urus-Martan prosecutor's office for questioning. One of the letters contained a handwritten note signed by Mr G. stating that he was "not a witness". According to the applicant, it did not appear that Mr G. had ever been questioned, as she had not seen any documents reporting on any such interview.

77. She also submitted that there had been no evidence in the case file confirming that the investigating authorities had made any attempts to question any officials of the military commander's office or those of the FSB Division, apart from two officers. She did not see any documents indicating that the investigators had attempted to establish which military unit in Urus-Martan had had armoured personnel carriers or "Ural" and UAZ military vehicles and where those vehicles had been at the time of the incident with the applicant's son.

78. According to the applicant, in late 2005 the investigators had not undertaken any meaningful actions, apart from questioning one witness. The documents relating to the period in question represented standard letters from the prosecutor's office requesting that the search for the applicant's son be stepped up and standard replies from the district office of the interior stating that the search was in progress.

79. Finally, the applicant submitted that she had not seen any documents disclosing State secrets or military information in the case file.

B. The Court's requests for the investigation file

80. In May 2005, when the application was communicated to them, the Government were invited to produce a copy of the investigation file in criminal case no. 25082 opened into the abduction of Artur Bersunkayev. Relying on the information obtained from the Prosecutor General's Office, the Government replied that the investigation was in progress and that disclosure of the documents would be in violation of Article 161 of the Russian Code of Criminal Procedure, since the file contained information of a military nature and personal data concerning the witnesses. At the same time, the Government suggested that a Court delegation be given access to the file at the place where the preliminary investigation was being conducted, with the exception of "the documents [disclosing military information and personal data concerning the witnesses], and without the right to make copies of the case file and to transmit it to others". In October 2005 the Court reiterated its request and suggested that Rule 33 § 3

of the Rules of Court be applied. In reply, the Government submitted several documents but refused to produce the entire investigation file for the aforementioned reasons.

81. Overall, the Government produced 31 documents running to 36 pages from the case file, which, as could be ascertained from the page numbering, comprised at least 244 pages. The documents included:

(a) a procedural decision of 28 June 2001 to institute criminal proceedings in connection with Artur Bersunkayev's disappearance;

(b) procedural decisions suspending and reopening the investigation in case no. 25082;

(c) investigators' decisions to take up case no. 25082;

(d) letters informing the applicant of the suspension and re-opening of the investigation in criminal case no. 25082.

82. On 10 July 2007 the application was declared admissible. At that stage the Court once again invited the Government to submit the investigation file and to provide information concerning the progress of the investigation. In October 2007 the Government informed the Court that after 22 October 2005, the latest date on which the investigation had been reopened, the investigating authorities had questioned three witnesses, namely the applicant, Mrs Tsugayeva and the latter's neighbour. The Government refused to submit any documents from the case file other than those produced earlier.

II. RELEVANT DOMESTIC LAW

83. Article 109 of the Code of Criminal Procedure of 1960 in force until 1 July 2002 provided that the competent authorities were under an obligation to take a decision in respect of any written or oral complaint concerning a criminal offence within a period no longer than three days, and in exceptional cases no longer than ten days, from the date on which the complaint had been received.

84. Article 125 of the Russian Code of Criminal Procedure in force as of 1 July 2002 provides that a decision by an investigator or prosecutor to dispense with criminal proceedings or to terminate criminal proceedings, and other decisions and acts or omissions which are liable to infringe the constitutional rights and freedoms of the parties to criminal proceedings or to impede citizens' access to justice, may be appealed against to a district court, which is empowered to check the lawfulness and grounds of the impugned decisions.

85. Article 161 of the Russian Code of Criminal Procedure enshrines the rule that data from a preliminary investigation may not be disclosed. Paragraph 3 of the same Article provides that information from an investigation file may be divulged with the permission of a prosecutor or investigator and only in so far as it does not infringe the rights and lawful

interests of the participants in the criminal proceedings and does not prejudice the investigation. It is prohibited to divulge information about the private life of participants in criminal proceedings without their permission.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

86. The Government argued that the present application should be declared inadmissible for non-exhaustion of domestic remedies, stating that the investigation into the abduction of the applicant's son was still in progress.

87. The applicant contended that the Government had not indicated which particular domestic remedy she had not exhausted. She further stated that the Government's argument to the effect that the investigation was ongoing related to the merits of the present case rather than to the question of its admissibility.

88. The Court notes that, in its decision of 10 July 2007, it considered that the question of exhaustion of domestic remedies was closely linked to the substance of the applicant's complaints and that it should be joined to the merits. Noting the arguments presented by the parties on this question, the Court considers that the Government's preliminary objection raises issues which are closely linked to the question of the effectiveness of the investigation, and it would therefore be appropriate to address the matter in the examination of the substance of the applicant's complaints under Article 2 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

89. The applicant complained of a violation of the right to life in respect of her son, Artur Bersunkayev. She submitted that the circumstances of his disappearance and the long period during which his whereabouts could not be established indicated that Artur Bersunkayev had been killed by the federal forces. The applicant also complained that no effective investigation had been conducted into her son's disappearance. She referred to Article 2 of the Convention, which reads as follows:

"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. Alleged failure to protect the right to life

1. Submissions by the parties

90. The applicant argued that it was beyond reasonable doubt that Artur Bersunkayev had been detained by representatives of the security agencies, this fact being confirmed by eyewitness statements, including those of public officials. She referred, in particular, to a letter of 6 November 2001 of the deputy prosecutor of the Chechen Republic, stating that “the fact of the implication of the Urus-Martan Division of the FSB in Artur Bersunkayev’s abduction has been established”, which she had found among the materials of the file of case no. 25082 (see paragraph 72 above). The applicant also submitted that the men who had taken her son away had arrived in the night during the curfew in military vehicles; they had had military uniforms and radio transmitters and had spoken Russian without an accent. She further stressed that Artur Bersunkayev had been apprehended in life-endangering circumstances, given that there was a widespread practice of forced disappearances, tortures and killings in Chechnya during the period in question. The applicant thus argued that, in view of the above and given that her son had been missing for over four years at the time she submitted her observations, he may be presumed dead even in the absence of any formal evidence confirming his death.

91. The Government relied on the information provided by the Prosecutor General’s Office and argued that the Russian authorities were not responsible for the actions of the unidentified persons who had abducted Artur Bersunkayev and that the investigation had not obtained any evidence to the effect that representatives of the federal power structures had been involved in the imputed offence. They submitted to that end that members of illegal armed formations within the territory of the Chechen Republic resorted to various methods of concealing the fact of their participation in such groups and that of recruitment of new members, such as “deliberate dissemination of false information concerning their disappearances from the places of their permanent residence and implication of the federal forces in such disappearances”. Moreover, the aforementioned false information was

also used by “representatives of international terrorist organisations, leaders of illegal armed groups and their emissaries abroad for the purpose of propaganda against the State agencies of Russia”. The Government argued therefore that there were no grounds to claim that Artur Bersunkayev’s right to life secured by Article 2 of the Convention had been breached.

2. *The Court’s assessment*

92. The Court reiterates that, in the light of the importance of the protection afforded by Article 2, it must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. It has held on many occasions that, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused. The obligation on the authorities to account for the treatment of an individual within their control is particularly stringent where that individual dies or disappears thereafter (see, among other authorities, *Orhan v. Turkey*, no. 25656/94, § 326, 18 June 2002, and the authorities cited therein). Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in detention, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII, and *Çakıcı v. Turkey* [GC], no. 23657/94, § 85, ECHR 1999-IV).

93. In the present case, the Court observes that although the Government denied that the State was responsible for the abduction and disappearance of the applicant’s son, they acknowledged the specific facts underlying the applicant’s version of events. In particular, it is common ground between the parties that Artur Bersunkayev was abducted from his home by men in masks and camouflage uniforms armed with automatic firearms during the night of 13 June 2001. It has therefore first to be established whether the armed men belonged to the federal armed forces.

94. The Court notes at the outset that despite its repeated requests for a copy of the investigation file concerning the abduction of Artur Bersunkayev, the Government refused to produce it, referring to Article 161 of the Russian 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 it (see, for example, *Imakayeva v. Russia*, no. 7615/02, § 123, ECHR 2006-... (extracts)). In view of the foregoing and bearing in mind the principles cited above, the Court finds that it can draw inferences from the Government’s conduct in this respect.

95. It further considers that the applicant presented a coherent and consistent picture of her son's abduction on 13 June 2001. She stated, with reference to the eye-witness statements of her brother-in-law, his wife and their neighbour, that the perpetrators had acted in a manner similar to that of a security operation. In particular, they had arrived in a group during the night and had spoken Russian without an accent. A military vehicle had also been seen near the scene of the incident on the night of 13 June 2001 (see paragraph 17 above). In this latter respect the Court is sceptical about the Government's assertion that "some of the witnesses, indeed, confirmed that they had seen a "Ural" military vehicle with servicemen near the house of the Bersunkayev family, but that was long before the alleged abduction" of Artur Bersunkayev, given that, unlike the applicant, the Government did not produce copies of any of the witness statements to which they referred. In the Court's opinion, the fact that a group of armed men in camouflage uniforms, equipped with portable transmitters and a military vehicle and able to move freely during the curfew and to apprehend a person at his home in a town area strongly supports the applicant's allegation that they were State agents.

96. Moreover, it appears that, at least initially, the fact of Artur Bersunkayev's detention was acknowledged by some of the Urus-Martan officials. The Court notes the applicant's relevant submissions before the domestic authorities and before the Court (see paragraphs 22 – 24, 52, 59 and 60 above) as well as the Government's statement to the effect that Mr Ya., the head of the Urus-Martan administration, and Mr M.G., the deputy head of the Urus-Martan administration, had indicated when questioned by the investigating authorities that in the first few days following 13 June 2001 they had had information that Artur Bersunkayev had been detained (see paragraph 55 above).

97. In support of her submissions, the applicant also referred to a letter of the deputy prosecutor of the Chechen Republic dated 6 November 2001 stating that "the fact of the implication of the Urus-Martan Division of the FSB in Artur Bersunkayev's abduction has been established" which, according to her, she had found among the materials of the file of case no. 25082 (see paragraph 72 above). The Government remained silent as regards this argument.

98. The Court observes that 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 applicant, or to provide a satisfactory and convincing explanation of how the events in question occurred. The burden of proof is thus shifted to the Government and if they fail in their arguments, issues will arise under Article 2 and/or Article 3 (see *Toğcu v. Turkey*,

no. 27601/95, § 95, 31 May 2005, and *Akkum and Others v. Turkey*, no. 21894/93, § 211, ECHR 2005-II).

99. Taking into account the above elements, the Court is satisfied that the applicant has made a *prima facie* case that her son was detained by State agents. The Government's statement that the investigation did not find any evidence to support the involvement of the special forces in the abduction is insufficient to discharge them from the above-mentioned burden of proof. The Court is also sceptical about the Government's assertion of the possible implication of illegal fighters in the abduction of Artur Bersunkayev, given that this allegation was not specific and was not supported by any materials. Drawing inferences from the Government's failure to submit the documents from the criminal investigation file which were in their exclusive possession or to provide another plausible explanation of the events in question, the Court finds it established that Artur Bersunkayev was detained on 13 June 2001 by State agents.

100. The Court further notes that there has been no reliable news of the applicant's son since that date. His name has not been found in the official records of any detention facilities. The domestic investigation into Artur Bersunkayev's disappearance, dragging on for over seven years, has not made any meaningful findings regarding his fate. Lastly, the Government did not submit any explanation as to what had happened to him after he had been apprehended.

101. Having regard to the previous cases concerning disappearances of people in Chechnya which have come before the Court (see, for example, *Imakayeva*, cited above, and *Luluyev and Others v. Russia*, no. 69480/01, ECHR 2006-... (extracts)), the Court considers that, in the context of the conflict in the Chechen Republic, when a person is detained by unidentified servicemen without any subsequent acknowledgement of the detention, this can be regarded as life-threatening. The absence of Artur Bersunkayev or any news of him for over seven years corroborates this assumption. In the light of these considerations and having regard to the particular circumstances of the case, and more specifically the considerable lapse of time since the day on which Artur Bersunkayev went missing, the Court finds that he must be presumed dead following unacknowledged detention by State agents.

102. In the absence of any plausible explanation on the part of the Government as to the circumstances of Artur Bersunkayev's death, the Court further finds that the Government have not accounted for the death of the applicant's son during his detention and that the respondent State's responsibility for this death is therefore engaged.

103. Accordingly, there has been a violation of Article 2 of the Convention in this connection.

B. Alleged inadequacy of the investigation

1. Submissions by the parties

104. The applicant argued that the investigation in the present case had fallen short of the requirements of domestic law and of Convention standards. She pointed out that the investigation had not been commenced before 28 June 2001, that is, two weeks after her son's apprehension and disappearance. Moreover, the investigation had been plagued with considerable periods of inactivity, in particular, between June and October 2001 and between October 2001 and March 2003. The investigating authorities had failed to question the key witness, military commander G., who had then been killed in November 2001, and it was not before March 2003 that eye-witnesses to Artur Bersunkayev's arrest were questioned. The applicant further contended that the Government had referred to interviews with a number of witnesses in 2003-2005, but had failed to indicate the results of those interviews or their effect on the investigation. The investigation had failed to establish the identity of the men who had apprehended the applicant's son, and the State body which they had represented. The investigation had by now been going on for several years, but had failed to identify those responsible.

105. The Government argued that the applicant's complaint concerning her son's abduction had been received by the Urus-Martan prosecutor's office on 19 June 2001, and the criminal proceedings in that connection had been commenced on 28 June 2001, which had been in full compliance with the time-limit established by Article 109 of the Code of Criminal Procedure of 1960 then in force. They also claimed that the investigation into the disappearance of the applicant's son met the Convention requirement of effectiveness, as all measures envisaged in national law were being taken to identify those responsible.

2. The Court's assessment

106. 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", 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, in particular by agents of the State. The investigation must be effective in the sense that it is capable of leading to the identification and punishment of those responsible (see *Oğur v. Turkey* [GC], no. 21594/93, § 88, ECHR 1999-III). In particular, there must be an implicit requirement of promptness and reasonable expedition (see *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports of Judgments and*

Decisions 1998-VI, § 102-04, and *Mahmut Kaya v. Turkey*, no. 22535/93, ECHR 2000-III, §§ 106-07). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating the use of lethal force may generally be regarded as essential in maintaining public confidence in the maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Shanaghan v. the United Kingdom*, no. 37715/97, §§ 91-92, 4 May 2001).

107. In the instant case, the Court observes that some degree of investigation was carried out into the disappearance of the applicant's son. It must assess whether that investigation met the requirements of Article 2 of the Convention. The Court notes in this connection that its knowledge of the criminal proceedings at issue is rather limited in view of the respondent Government's refusal to submit the investigation file (see paragraphs 80–82 above). Drawing inferences from the respondent Government's conduct when evidence was being obtained (see *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, pp.64-65, § 161), the Court will assess the merits of this complaint on the basis of the available information in the light of these inferences.

108. The Court notes that the applicant notified the authorities about her son's abduction on 19 June 2001 at the latest. However, the authorities did not institute criminal proceedings until 28 June 2001, that is, ten days after the applicant had lodged her written complaint about her son's disappearance. The Court cannot see any explanation for such a delay in a situation where prompt action was vital. It cannot accept the Government's argument that following the applicant's complaint the criminal proceedings had been instituted within the time-limit established in Article 109 of the Code of Criminal Procedure of 1960, as the said Article clearly provided that a decision in respect of a complaint about a criminal offence was to be taken within three days after the complaint had been submitted, and that it was only in exceptional cases that a decision could be taken within ten days (see paragraph 83 above). The Government did not indicate any of the exceptional circumstances or provide any justification which could have explained such a prolonged examination of the applicant's complaint, which concerned such a serious crime, as abduction, and clearly required urgent measures to be taken.

109. Furthermore, once the investigation was opened it was plagued with inexplicable shortcomings in taking the most essential steps, which

could not but undermine its effectiveness from a very early stage. In particular, it does not appear that any meaningful efforts were made to investigate the possible involvement of federal servicemen or officers of the security agencies into the disappearance of Artur Bersunkayev. More specifically, it does not appear, and the Government did not submit any relevant information in this regard, that any inspection was ever carried out either of the place where the applicant's son had been abducted, or the place where he could have been held, such as the premises of the Urus-Martan VOVD, or the Urus-Martan Division of the FSB, or the Urus-Martan military commander's office, or that the investigating authorities attempted to find out whether any special operations were conducted in the vicinity of the Bersunkayev family's domicile on the night of the incident. Nor does it appear, as alleged by the applicant, that any attempts were made to question any military officials or those of security agencies other than Mr K. and Mr A (see paragraphs 54 and 55 above).

110. The Court further finds it striking that witnesses, including eye-witnesses to the incident of 13 June 2001, were not questioned until 2003, that is, two years after the events in question. Moreover, military commander G., who, it appears, could have been an important witness in the case, given in particular the applicant's oral statement to the investigating authorities about his role in Artur Bersunkayev's detention (see paragraph 52 above), was never questioned. The Court cannot accept the Government's argument that it had been impossible to question Mr G. because he had died in a terrorist attack. It notes in this respect that the investigation was opened on 28 June 2001, whilst, according to the Government, the tragic incident with Mr G. took place on 29 November 2001. No reasonable explanation was submitted to the Court as to why, during a period of five months, the investigators could not question Mr G. Nor can the Court accept the Government's allegation that certain written information had been received from Mr G. to the effect that he had had no information regarding Artur Bersunkayev, as the Government failed to submit a copy of the document to which they referred, with the result that the Court is unable to assess the reliability and relevance of that information.

111. The Court further notes a substantial delay in granting the status of victim to the applicant. Whilst the investigation commenced on 28 June 2001, it was not until 18 September 2003 that the applicant was declared a victim in the case, which afforded her minimum guarantees in the criminal proceedings. Moreover, it appears that before – or even after – the said decision was taken, the applicant was informed of the progress in the investigation only occasionally and fragmentarily. Furthermore, after the applicant had been granted the status of a victim, she was only able to have access to the file of the criminal investigation two years later, after she had

obtained a court decision ordering the investigating authorities to grant her access to it (see paragraph 65 above).

112. Lastly, the Court notes that the investigation has been ongoing since June 2001, during which period it was stayed and resumed on at least ten occasions. It remained suspended, in particular, between August 2003 and March 2004 and between November 2004 and July 2005, for which periods of inactivity the Government did not provide any explanation.

113. In the light of the foregoing, and with regard to the inferences drawn from the respondent Government's submission of evidence, the Court is bound to conclude that the authorities failed to carry out a thorough and effective investigation into the circumstances surrounding the disappearance of Artur Bersunkayev. It accordingly dismisses the Government's preliminary objection as regards the applicant's failure to exhaust domestic remedies within the context of the criminal proceedings, and holds that there has been a violation of Article 2 of the Convention on that account.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

114. The applicant referred to Article 3 of the Convention, claiming that her son had been beaten when being apprehended and that she had serious grounds to believe that he had been subjected to torture and inhuman treatment in detention. She further complained that no effective investigation had been conducted into the matter. Under this heading the applicant also submitted that she had suffered severe mental distress and anguish in connection with her son's disappearance and on account of the State's failure to conduct a thorough investigation into the matter. The respective Article reads as follows:

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

A. Alleged ill-treatment of the applicant's son

115. The applicant insisted that Artur Bersunkayev had been subjected to treatment contrary to Article 3 of the Convention and that the authorities had not conducted a thorough investigation into the matter.

116. The Government contended that there was no evidence confirming that the applicant's son had been subjected to treatment in breach of Article 3 of the Convention or that the authorities had violated the said provision during the investigation.

117. The Court reiterates that allegations of ill-treatment must be supported by appropriate evidence. To assess this evidence, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such

proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Ireland v. the United Kingdom*, cited above, pp. 64-65, § 161 *in fine*).

118. The Court has found it established that Artur Bersunkayev was detained on 13 June 2001 by State agents. It has also found that, in view of all the known circumstances, he can be presumed dead and that the responsibility for his death lies with the State authorities (see paragraphs 101-102 above). However, in the absence of any relevant information or evidence the Court is unable to establish, to the necessary degree of proof, the exact way in which the applicant's son died and whether he was subjected to ill-treatment while in detention, and finds that this complaint has not been substantiated.

119. Against this background, the Court finds no violation of Article 3 of the Convention on this account.

B. Alleged mental suffering of the applicant

120. The applicant also argued that she had endured severe mental suffering falling within the scope of Article 3 of the Convention on account of her son's disappearance.

121. In the Government's submission, "the materials of the criminal case do not make it possible to assess the degree of the applicant's mental suffering", and the domestic authorities had not taken any actions aiming at "humiliating, punishing or torturing" the applicant.

122. The Court observes that the question whether a member of the family of a "disappeared person" is a victim of treatment contrary to Article 3 will depend on the existence of special factors which give the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. The Court would further emphasise that the essence of such a violation does not mainly lie in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct (see *Orhan*, cited above, § 358, and *Imakayeva*, cited above, § 164).

123. On the facts, the Court observes that the person that went missing in the present case was the applicant's son. It has now been over seven years since she has had any news of him. The applicant's distress during this

period is attested by her numerous efforts to prompt the authorities to act, as well as by her own attempts to search for her son. The Court further refers to its above findings regarding the shortcomings in the investigation. In particular, it considers that significant delays in granting the applicant the status of victim of a crime and in allowing her access to the case file and the lack of information about the investigation throughout the proceedings are elements that contributed to her suffering. It follows that the applicant's uncertainty about her son's fate was aggravated by the fact that she was denied the opportunity to monitor the progress of the investigation.

124. The Court therefore finds that the applicant suffered distress and anguish as a result of her son's disappearance and of her inability to find out what had happened to him or to receive up-to-date and exhaustive information on the investigation. The manner in which the applicant's complaints have been dealt with by the authorities must be considered to constitute inhuman treatment contrary to Article 3 of the Convention.

125. In the light of the foregoing, the Court finds that there has been a violation of Article 3 of the Convention on that account.

IV. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

126. The applicant complained that the provisions of Article 5 as a whole, relating to the lawfulness of detention and guarantees against arbitrariness, had been violated in respect of her son. This Article provides as follows:

“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.”

127. The applicant claimed that her son’s detention had not satisfied any of the conditions set out in Article 5 of the Convention, had had no basis in national law and had not been in accordance with a procedure established by law or been formally registered.

128. In the Government’s submission, there was no evidence to confirm that the applicant’s son had been detained in breach of the guarantees set out in Article 5 of the Convention. According to them, Artur Bersunkayev was not listed among the persons being held in detention centres.

129. The Court has frequently emphasised the fundamental importance of the guarantees contained in Article 5 for securing the rights of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. In that context, it has repeatedly stressed that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrary detention. To minimise the risks of arbitrary detention, Article 5 provides a corpus of substantive rights intended to ensure that the act of deprivation of liberty is amenable to independent judicial scrutiny and secures the accountability of the authorities for that measure. The unacknowledged detention of an individual is a complete negation of these guarantees and discloses a most grave violation of Article 5 (see, among other authorities, *Çakıcı*, cited above, § 104).

130. It has been established above that Artur Bersunkayev was detained on 13 June 2001 by State agents and has not been seen since. His detention was not acknowledged, was not logged in any custody records and there exists no official trace of his subsequent whereabouts or fate. In accordance with the Court’s practice, this fact in itself must be considered a most serious failing, since it enables those responsible for an act of deprivation of liberty to conceal their involvement in a crime, to cover their tracks and to escape accountability for the fate of a detainee. Furthermore, the absence of detention records, noting such matters as the date, time and location of detention and the name of the detainee as well as the reasons for the detention and the name of the person effecting it, must be seen as incompatible with the very purpose of Article 5 of the Convention (see *Orhan*, cited above, § 371).

131. The Court further considers that the authorities should have been alert to the need to investigate more thoroughly and promptly the applicant’s complaints that her son had been detained and taken away in life-threatening circumstances. However, the Court’s findings above in

relation to Article 2 and, in particular, the conduct of the investigation leave no doubt that the authorities failed to take prompt and effective measures to safeguard Artur Bersunkayev against the risk of disappearance.

132. Consequently, the Court finds that Artur Bersunkayev was held in unacknowledged detention in complete disregard of the safeguards enshrined in Article 5, and that this constitutes a particularly grave violation of his right to liberty and security enshrined in Article 5 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

133. The applicant alleged that she had had no effective remedies in respect of her complaints under Articles 2, 3 and 5, contrary to Article 13 of the Convention, which provides as follows:

“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.”

134. The applicant relied on Article 13 of the Convention, alleging that in her case the domestic remedies usually available had proved to be ineffective.

135. The Government contended that the applicant had had effective domestic remedies, as required by Article 13 of the Convention. They argued that she had received reasoned replies to all her requests and queries made in the context of the investigation and had been able to lodge a court complaint against actions of the investigating authorities, in accordance with Article 125 of the Russian Code of Criminal Procedure. According to the Government, the fact that this complaint was disallowed by the domestic courts did not indicate that the remedy invoked by them had been ineffective. The Government further argued that if the applicant had considered that any action or omission of public officials had caused her damage, she could have sought compensation for that damage in court by virtue of the relevant provisions of the Russian Civil Code. In support of this argument, the Government referred to a decision of the Supreme Court of the Republic of Karachayevo-Cherkessia dated 19 October 2004 by which a plaintiff had been awarded a certain amount in respect of non-pecuniary damage inflicted by the unlawful actions of a prosecutor’s office. The Government did not enclose a copy of that decision.

136. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in

which they comply with their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by acts or omissions by the authorities of the respondent State (see *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, § 95).

137. Given the fundamental importance of the right to protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life, including effective access for the complainant to the investigation procedure leading to the identification and punishment of those responsible (see *Anguelova v. Bulgaria*, no. 38361/97, §§ 161-162, ECHR 2002-IV; *Asenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports* 1998-VIII, § 117; and *Süheyla Aydın v. Turkey*, no. 25660/94, § 208, 24 May 2005). The Court further reiterates that the requirements of Article 13 are broader than a Contracting State's obligation under Article 2 to conduct an effective investigation (see *Orhan*, cited above, § 384).

138. In view of the Court's findings above with regard to Article 2, the applicant's complaint was clearly "arguable" for the purposes of Article 13 (see *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, § 52). The applicant should accordingly have been able to avail herself of effective and practical remedies capable of leading to the identification and punishment of those responsible and to an award of compensation for the purposes of Article 13.

139. The Court has held in a number of similar cases that in circumstances where, as in the present case, the criminal investigation into the death was ineffective (see paragraph 113 above) and the effectiveness of any other remedy that may have existed, including the civil remedies, was consequently undermined, the State has failed in its obligation under Article 13 of the Convention (see, among other authorities, *Musayeva and Others v. Russia*, no. 74239/01, § 118, 26 July 2007, or *Kukayev v. Russia*, no. 29361/02, § 117, 15 November 2007). It therefore rejects the Government's argument that the applicant had effective remedies afforded her by criminal or civil law and finds that there has been a violation of Article 13 of the Convention in connection with Article 2 of the Convention.

140. As to the applicant's complaint under Article 13 about the lack of domestic remedies in respect of her complaint under Article 3 that Artur Bersunkayev had been ill-treated while in detention at the hands of the authorities, the Court notes that this latter complaint was found unsubstantiated (see paragraph 118 above). In the absence of an "arguable

claim” of a violation of a substantive Convention provision the Court finds that there has been no violation of Article 13 in this respect either.

141. As regards the applicant’s reference to Article 13 in conjunction with Article 3 of the Convention, in so far as her mental suffering was concerned, the Court notes that it has found above that the applicant endured severe mental suffering on account of, *inter alia*, the authorities’ inadequate investigation into her son’s disappearance (see paragraph 124 above). It has also found a violation of Article 13 of the Convention in connection with Article 2 of the Convention on account of the lack of effective remedies available to the applicant on account of the inadequacy of the investigation. Having regard to these findings, the Court is of the opinion that the applicant’s complaint under Article 13 in conjunction with Article 3 is subsumed by those under Article 13 in conjunction with Article 2 of the Convention. It therefore does not consider it necessary to examine the complaint under Article 13 in connection with Article 3 of the Convention.

142. Finally, as regards the applicant’s reference to Article 5 of the Convention, the Court refers to its findings of a violation of this provision set out above. It considers that no separate issues arise in respect of Article 13 read in conjunction with Article 5 of the Convention, which itself contains a number of procedural guarantees related to the lawfulness of detention.

VI. COMPLIANCE WITH ARTICLES 34 AND 38 § 1 (a) OF THE CONVENTION

143. The applicant stated that the Government’s refusal to submit a file in criminal case no. 25082 was in breach of the State’s obligations under Articles 34 and 38 § 1 (a) of the Convention. The relevant parts of these Articles provide:

Article 34

“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

Article 38

“1. If the Court declares the application admissible, it shall

(a) pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities;

...”

144. The applicant invited the Court to conclude that the Government’s refusal to submit a copy of the entire investigation file in response to the Court’s requests was incompatible with their obligations under Articles 34 and 38 § 1 (a) of the Convention.

145. The Government reiterated that the submission of the entire case file would be contrary to Article 161 of the Russian Code of Criminal Procedure. They also submitted that they had taken into account the possibility to request confidentiality under Rule 33 of the Rules of Court, but noted that the Court provided no guarantees that once in receipt of the investigation file, the applicant or her representatives would not disclose these materials to the public. According to the Government, in the absence of any sanctions in respect of the applicant for a disclosure of confidential information and materials, there were no guarantees of the compliance by the applicant with the Convention and the Rules of Court.

146. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted under Article 34 of the Convention that States should furnish all necessary facilities to make possible a proper and effective examination of applications (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 70, ECHR 1999-IV). This obligation requires the Contracting States to furnish all necessary facilities to the Court, whether it is conducting a fact-finding investigation or performing its general duties as regards the examination of applications. Failure on a Government’s part to submit such information which is in their hands, without a satisfactory explanation, may not only give rise to the drawing of inferences as to the well-foundedness of the applicant’s allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention (see *Timurtaş v. Turkey*, no. 3531/94, § 66, ECHR 2000-VI). In a case where the application raises issues of the effectiveness of an investigation, the documents of the criminal investigation are fundamental to the establishment of facts and their absence may prejudice the Court’s proper examination of the complaint both at the admissibility stage and at the merits stage (see *Tanrıkulu*, cited above, § 70).

147. The Court observes that it has on several occasions requested the Government to submit a copy of the file on the investigation opened in connection with the disappearance of the applicant’s son. The evidence contained in that file was regarded by the Court as crucial to the establishment of the facts in the present case. In reply, the Government produced only copies of procedural decisions instituting, suspending and reopening criminal proceedings, those of investigators’ decisions taking up the criminal case and letters informing the applicant of the suspension and reopening of the criminal proceedings in the case. They refused to submit any other documents, such as transcripts of witness interviews, reports on

investigative actions and others, with reference to Article 161 of the Russian Code of Criminal Procedure.

148. The Court further notes that the Government did not request the application of Rule 33 § 2 of the Rules of Court, which permits a restriction on the principle of the public character of the documents deposited with the Court for legitimate purposes, such as the protection of national security and the private life of the parties, and the interests of justice. The Court further notes that the provisions of Article 161 of the Russian Code of Criminal Procedure, to which the Government referred, do not preclude disclosure of the documents from the file of an ongoing investigation, but rather set out the procedure for and limits to such disclosure. The Government failed to specify the nature of the documents and the grounds on which they could not be disclosed (see, for similar conclusions, *Mikheyev v. Russia*, no. 77617/01, § 104, 26 January 2006). The Court also notes that in a number of comparable cases that have been reviewed by the Court, the Government submitted documents from the investigation files without reference to Article 161 (see, for example, *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, § 46, 24 February 2005, or *Magomadov and Magomadov v. Russia*, no. 68004/01, §§ 36 and 82, 12 July 2007), or agreed to produce documents from the investigation files even though they had initially invoked Article 161 (see *Khatsiyeva and Others v. Russia*, no. 5108/02, §§ 62-63, 17 January 2008). For these reasons, the Court considers the Government's explanations concerning the disclosure of the case file insufficient to justify withholding the key information requested by the Court.

149. Having regard to the importance of cooperation by the respondent Government in Convention proceedings and the difficulties associated with the establishment of the facts in cases such as the present one, the Court finds that the Russian Government fell short of their obligations under Article 38 § 1 (a) of the Convention on account of their failure to submit copies of the documents requested in respect of the disappearance of the applicant's son.

150. In view of the above finding, the Court considers that no separate issue arises under Article 34 of the Convention.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

151. 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

152. The applicant claimed compensation for non-pecuniary damage on account of the fear, anguish and distress which she had suffered as a result of her son’s disappearance, leaving the determination of the amount of the award to the Court’s discretion.

153. The Government stated that should the Court find a violation of the applicant’s rights, that finding would be adequate just satisfaction in the applicant’s case.

154. The Court observes that it has found a violation of Articles 2, 3, 5 and 13 of the Convention on account of the unlawful detention and disappearance of the applicant’s son, the mental suffering endured by the applicant and the absence of effective remedies to secure domestic redress for those violations. The Court has also found a violation of Article 38 § 1 (a) of the Convention on account of the Government’s failure to submit the materials requested by the Court. The applicant must have suffered anguish and distress as a result of all these circumstances, which cannot be compensated by a mere finding of a violation. Having regard to these considerations, the Court awards the applicant, on an equitable basis, 35,000 euros (EUR) for non-pecuniary damage, plus any tax that may be chargeable on this amount.

B. The applicant’s request for an investigation and other measures

155. The applicant also requested, referring to Article 41 of the Convention, that “an independent investigation which would comply with the requirements of the Convention” be conducted into her son’s disappearance. She relied in this connection on the cases of *Assanidze v. Georgia* ([GC], no. 71503/01, §§ 202-203, ECHR 2004-II) and *Tahsin Acar v. Turkey* ((preliminary objection) [GC], no. 26307/95, § 84, ECHR 2003-VI) and on the case-law of the Inter-American Court. With reference to the latter’s practice the applicant also requested that other measures be ordered by the Court. Those included a “public apology”, whereby the respondent Government should acknowledge publicly its responsibility for the violation of the applicant’s rights and those of her son, and “allowing the applicant to contact her son, if he was alive, or indicating

the place of his burial and transfer his remains to the cemetery indicated by the applicant”.

156. The Government argued that the investigation into the disappearance of the applicant’s son had been conducted in full compliance with relevant domestic legislation. They further stated that the whereabouts of Artur Bersunkayev had not been established so far, and his body had not been found. They assured the Court that as soon as any information concerning the fate of the applicant’s son was received, the applicant would be notified.

157. The Court reiterates that, in the context of the execution of judgments in accordance with Article 46 of the Convention, a judgment in which it finds a breach imposes on the respondent State a legal obligation under that provision to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*restitutio in integrum*). However, its judgments are essentially declaratory in nature and, in general, it is primarily for the State concerned to choose the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court’s judgment (see, among other authorities, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001-I; *Akdivar and Others v. Turkey* (Article 50), judgment of 1 April 1998, Reports 1998-II, pp. 723-24, § 47; and *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, p. 25, § 58). This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1) (see, *mutatis mutandis*, *Papamichalopoulos and Others v. Greece* (Article 50), judgment of 31 October 1995, Series A no. 330-B, pp. 58-59, § 34).

158. The Court notes that the present case is distinguishable from the ones referred to by the applicant. In particular, in the *Assanidze* judgment the Court held that the respondent State was to secure the applicant’s release so as to put an end to the violations of Article 5 § 1 and Article 6 § 1, whereas in the *Tahsin Acar* judgment the effective investigation was mentioned in the context of the Court’s examination of the respondent Government’s request for the application to be struck out on the basis of their unilateral declaration. The Court further notes its above finding that in the present case the effectiveness of the investigation had already been undermined in the early stages by the domestic authorities’ failure to take essential investigative measures and that after seven years the investigation was unable to make any meaningful findings as regards Artur Bersunkayev’s fate (see paragraphs 100 and 109 above). It is therefore very

doubtful that the situation existing before the breach could be restored, and particularly not as a result of the measures requested by the applicant.

159. In such circumstances, having regard to the established principles cited above, the Court finds it most appropriate to leave it to the respondent Government to choose the means to be used in the domestic legal order in order to discharge their legal obligation under Article 46 of the Convention (see *Kukayev*, cited above, § 134).

C. Costs and expenses

160. The applicant claimed EUR 3,187 and 2,398.80 United Kingdom pounds sterling (GBP – approximately EUR 3,000) for the fees and costs she had incurred before the Court. These amounts included EUR 1,800 for a lawyer of the Memorial Human Rights Centre, EUR 1,170 for the work done by the field staff of the Memorial Human Rights Centre office in the Northern Caucasus, GBP 200 for a lawyer of the European Human Rights Advocacy Centre, GBP 900 in respect of professional fees of Mr Timothy Otty QC “for advice on evidence in the present case”, EUR 208 for administrative costs and GBP 1,198.80 for administrative costs and translation of documents. The applicant requested that the amount sought be transferred directly into her representatives’ account.

161. The Government argued that Mr Timothy Otty QC was not indicated as the applicant’s representative in the applicant’s power of attorney, although he had signed that document. In their view, the applicant’s claim in respect of his professional fees was therefore unsubstantiated.

162. The Court reiterates that costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred, and were also reasonable as to quantum (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

163. The Court observes that in September 2003 the applicant gave power of attorney to the five lawyers of the Memorial Human Rights Centre and the European Human Rights Advocacy Centre to represent her interests in the proceedings before the European Court of Human Rights, and that two of those lawyers acted as the applicant’s representatives throughout the proceedings. As regards the Government’s argument, the Court notes that whilst it is true that Mr Timothy Otty QC was not mentioned in the power of attorney signed by the applicant, he only provided advice on evidence as an expert rather than attempting to represent the applicant. On the other hand, the applicant’s lawyers, being themselves human rights experts, did not provide any explanation as to why it had been necessary for them to seek advice from another expert in this field. Against this background, the Court is not convinced that the costs and expenses in this part can be

regarded as necessarily incurred. Accordingly, the Court rejects the applicant's claim in the part regarding the professional fees of Mr Timothy Otty QC.

164. The Court further notes that this case was not particularly complex, but nevertheless required a certain amount of research work. Having regard to the amount of research and preparation carried out by the applicant's representatives, the Court does not find that part of the claim excessive.

165. In these circumstances, the Court awards the applicant the overall amount of EUR 4,700 together with any tax that may be chargeable to the applicant. The amount awarded in respect of costs and expenses shall be payable to the representatives directly.

D. Default interest

166. 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 preliminary objection;
2. *Holds* that there has been a violation of Article 2 of the Convention as regards the disappearance of Artur Bersunkayev;
3. *Holds* that there has been a violation of Article 2 of the Convention on account of the authorities' failure to carry out an adequate and effective investigation into the circumstances surrounding the disappearance of Artur Bersunkayev;
4. *Holds* that there has been no violation of Article 3 of the Convention as regards the alleged ill-treatment of Artur Bersunkayev;
5. *Holds* that there has been a violation of Article 3 of the Convention on account of the mental suffering endured by the applicant because of her son's disappearance and the lack of an effective investigation into the matter;
6. *Holds* that there has been a violation of Article 5 of the Convention in respect of Artur Bersunkayev;

7. *Holds* that there has been a violation of Article 13 of the Convention in conjunction with Article 2 of the Convention;
8. *Holds* that there has been no violation of Article 13 of the Convention as regards the alleged violation of Article 3 of the Convention in respect of Artur Bersunkayev;
9. *Holds* that no separate issues arise under Article 13 of the Convention in respect of the alleged violation of Article 3 in respect of the applicant on account of mental suffering and in respect of the alleged violation of Article 5 of the Convention;
10. *Holds* that there has been a failure to comply with Article 38 § 1 (a) of the Convention in that the Government refused to submit the documents requested by the Court;
11. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 35,000 (thirty-five thousand euros), to be converted into Russian roubles at the rate applicable at the date of settlement, in respect of non-pecuniary damage;
 - (ii) EUR 4,700 (four thousand seven hundred euros), to be converted into United Kingdom pounds sterling at the rate applicable at the date of settlement and paid into the applicant's representatives' bank account in the United Kingdom, in respect of costs and expenses;
 - (iii) any tax, including value-added tax, that may be chargeable to the applicant on the above amounts;
 - (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;
12. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 4 December 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President