



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

FIRST SECTION

CASE OF DZHAMAYEVA AND OTHERS v. RUSSIA

(Application no. 43170/04)

JUDGMENT

This version was rectified on 9 July 2009
under Rule 81 of the Rules of the Court

STRASBOURG

8 January 2009

FINAL

14/09/2009

This judgment may be subject to editorial revision.

In the case of Dzhamayevy v. Russia,

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

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Elisabeth Steiner,

Khanlar Hajiyeu,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 4 December 2008,

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

PROCEDURE

1. The case originated in an application (no. 43170/04) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by four Russian nationals, listed below (“the applicants”), on 18 November 2004.

2. The applicants were represented by lawyers of the Stichting Russian Justice Initiative (“SRJI”), an NGO based in the Netherlands with a representative office in Russia. The Russian Government (“the Government”) were represented by Ms V. Milinchuk, former Representative of the Russian Federation at the European Court of Human Rights and subsequently by their new representative, Mr G. Matyushkin.

3. On 1 September 2005 the Court decided to apply Rule 41 of the Rules of Court and to grant priority treatment to the application and on 21 January 2008 to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants are:

1. Ms Salamat Dudayevna Dzhamayeva, born in 1947;

2. Ms Khedisht Issayevna Dzhamayeva¹, born in 1974;
 3. Ms Kheda Issayevna Dzhamayeva, born in 1971;
 4. Mr Magomed Ismailovich Dzhamayev, born in 2001.
- They live in Staryye Atagi, the Chechen Republic.

A. Disappearance of Ismail Dzhamayev

1. The applicants' account

5. The first applicant is the mother, the second and third applicants are the sisters and the fourth applicant is the son of Mr Ismail Issayevich Dzhamayev, born in 1981. They lived together in the village of Stariye Atagi, the Grozny District. Mr Ismail Dzhamayev was a student of mathematics.

(a) Sweeping operation in Stariye Atagi

6. According to the applicants, from 6 to 11 March 2002 federal military officers, under the command of General Borisov, conducted a sweeping operation (*зачистка*) in the village of Stariye Atagi involving around 10,000 servicemen, 50 armoured personnel carriers ("APCs") and several military helicopters.

7. Throughout the said period the military besieged Stariye Atagi and restricted freedom of movement in the village. They organised a filtering point at the poultry-yard and the mill on the outskirts of Stariye Atagi where they kept the residents detained during the operation.

8. In total fifteen men residing in Stariye Atagi were apprehended between 6 and 11 March 2002. Whilst some of them were subsequently released, eleven residents disappeared. Relatives of ten of those who disappeared applied to the Court (see *Arzu Akhmadova and Others v. Russia*, no. 13670/03).

(b) Detention of Mr Ismail Dzhamayev

9. According to the applicants, Mr Ismail Dzhamayev was apprehended in the following circumstances. In the morning of 6 March 2002 the first applicant asked him to go and see his uncle who lived in the same village and buy something for him in the village shop. When Mr Ismail Dzhamayev was in the street apparently on the way from the shop to his uncle's house, he saw two APCs approaching. He got frightened, turned around the corner to Bezmyannaya Street and dropped in at Mr B.'s, his acquaintance. Mr B.'s mother let him in. As soon as he entered, servicemen ran into the yard after him. They said that there was a sweeping operation in the village

¹ Rectified on 9 July 2009: the text was "Ms Khedishit Issayevna Dzhamayeva..."

and that they would check the house. They searched the house. After the search they took Mr B. and Mr Ismail Dzhamayev with them. Mr B.'s mother asked them not to take the children away since they had all their documents with them. The servicemen checked the documents and then put Mr B. and Mr Ismail Dzhamayev in an APC. When Mr B.'s mother tried to intervene, however, the servicemen pushed her aside, hit her against the wall and left her lying on the ground.

10. The next day Mr B. was released. He said that after they had been apprehended, the servicemen took them around the village in the APC for approximately two or three hours while they checked other houses. They were thrown on the floor of the APC and the servicemen put their feet on them. Then they were taken to the filtration point. Mr B. said that he had heard Mr Dzhamayev's voice when the latter had been questioned. They had asked him what he had been doing at B.'s house, and Mr Dzhamayev had explained that he had gone to the shop and had just dropped by. When Mr B. heard that Mr Ismail Dzhamayev had not returned home he was surprised because he had heard nothing during the night and thought that Mr Dzhamayev had been released.

11. Upon his release Mr B. was barely alive because of the beating he had received from the servicemen. He died six months later.

(c) Other incidents in Stariye Atagi during the sweeping operation of 6 - 10 March 2002

12. On 7 March 2002 the residents of Stariye Atagi found several bodies in an abandoned house in the village. The applicants heard others saying that the people had first been blown up and then burned. It was impossible to identify them. However, somebody said that the bodies of some of the persons apprehended on 6 March 2002 had been seen.

13. The applicants also heard that a car had been burned on 9 March 2002.

14. On 10 March 2002 Mr T. Kh., Mr R. D. and Mr V. D. were apprehended and then held at a mill. They were put in a pit where they saw an inscription on the wall "Maka and Amir were here". Although Mr Dzhamayev's name was Ismail, everybody had called him Maka since his childhood. One of the servicemen confirmed that Mr Dzhamayev and Mr Amir Pokayev had been held there and said that they had been released in the afternoon the previous day, 9 March 2002.

15. The applicants concluded that Mr Dzhamayev could not have been one of the persons whose burnt bodies had been found in the burnt house on 7 March 2002 or in the car burnt on 9 March 2002. They alleged that on 9 March 2002, instead of being released, he had been transferred elsewhere.

2. Information submitted by the Government

16. The Government confirmed that a sweeping operation had been conducted in the village of Stariye Atagi from 6 to 13 March 2002. The aim of the operation had been to find and arrest members of illegal armed groups who had abducted and killed four servicemen of the FSB on 12 February 2002.

17. On 7 March 2002, at around 2 p.m., a fight broke out between members of the illegal armed groups and federal servicemen in a house at 81 Nagornaya Street. As a result of the use of small arms and grenade dispensers, four members of the illegal armed group were killed. Since the house was set on fire, bodies were severely burnt; after an inspection by law-enforcement officers they were handed over to the local administration for burial.

18. On 9 March 2002 a group of servicemen of military unit no. 3228 at a checkpoint situated within three kilometres from Stariye Atagi was fired at from a car that approached the checkpoint. The servicemen fired back. The explosives contained in the car were blown up, the car was set on fire and the three members of an illegal armed group in it were killed. Their bodies were also severely burnt and handed over to the local administration for burial. An AKM machine gun without its wooden parts, RGD-5 grenades without fuses, a makeshift hand grenade launcher, and other components of AKM machine guns and cartridge cases were found in the car and seized.

19. After the operation had been completed, village residents lodged applications concerning the apprehension and subsequent disappearance of eleven residents of Stariye Atagi, including Mr Ismail Dzhamayev.

3. Relevant information disclosed in relation to the case of Arzu Akhmadova and Others v. Russia, no. 13670/03

20. On 13 March 2002, after the special operation was over and the restrictions were lifted, the villagers brought all the unidentified corpses to Grozny. It appears that they did not manage to contact the authorities, and later that day they returned the bodies to Stariye Atagi.

21. On 14 or 15 March 2002 officers of the Grozny district office of the Interior (*РОВД Грозненского района*) took the corpses to the village of Tolstoy-Yurt intending to send them on to Mozdok for a forensic examination.

22. On 1 April 2002 D., an investigator from the Prosecutor's Office of the Chechen Republic, delivered the bodies back to Stariye Atagi. The corpses were wrapped in bags and were decomposed. They remained unidentified. D. explained to the villagers that the prosecutor's office had insufficient funds to conduct the forensic examination of the corpses and that the refrigerators in the forensic examination department in which they had been kept had been out of order.

23. On 3 April 2002 the residents of Stariye Atagi buried the unidentified bodies.

B. The search for Mr Ismail Dzhamayev and the investigation

1. The parties' submissions in the present case

24. Immediately after Mr Ismail Dzhamayev had been apprehended, the applicants started searching for him. They lodged numerous applications with prosecutors of various levels, public bodies and regional administrative authorities. They also visited a number of State bodies. The applicants mainly received formal responses informing them that their requests had been forwarded to various prosecutor's offices for examination.

25. On 13 March 2002 the Prosecutor's Office of the Grozny District (*прокуратура Грозненского района*) instituted a criminal investigation under Article 105 § 2 (a) of the Criminal Code of Russia (murder of two or more persons) in respect of the disappearance of 13 residents of Stariye Atagi, including Mr Ismail Dzhamayev, between 6 and 11 March 2002. The file was assigned no. 56031.

26. According to the applicants, on an unspecified date Mr B. and his mother were questioned. The second applicant went for questioning together with them and the relevant records should be in the criminal file.

27. According to the Government, on unspecified dates two of the applicants were granted victim status in the proceedings.

28. On 5 April 2002 the local administration of Stariye Atagi (*местная администрация села Старые Атаги*) issued the applicants with a certificate confirming that Mr Ismail Dzhamayev and nine other residents of Stariye Atagi had been apprehended and taken away by federal military officers between 6 and 11 March 2002 and had then disappeared. The certificate was signed by the acting head of administration of Stariye Atagi and bore an official stamp of the administration. It read, in so far as relevant, as follows:

“[The present] certificate is issued by the local administration of the village Stariye Atagi in respect of written applications by the village's residents, whose children were apprehended and taken for passport check in the period between 6 and 10 March 2002 during the special operation conducted by the federal troops.

The local administration thereby confirms that:

1. The following residents of Stariye Atagi were apprehended by the federal troops and taken to an unknown destination: on 6 March 2002 ... Dzhamayev Ismail Issayevich, born in 1981 ...

2. On 13 March 2002 the Grozny Military Prosecutor's Office instituted criminal proceedings no. 56031 in respect of the disappearance of the above-named persons following their relatives' applications; the investigation is under way.

3. A governmental commission headed by the deputy chairman of the Government of the Chechen Republic, Magomadov Nasrudin Nozhayevich, was created (by governmental decree no. 188-rp of 13 March 2002) [to investigate] the events.”.

29. On 11 March 2004 the Ministry of the Interior informed the first applicant that, since so far the investigation had failed to establish her son's fate, the Southern Federal District Office of the Interior was engaged in the search for him.

30. On 17 June 2004 a report of a forensic molecular-genetic expert examination was drawn up according to which Mr Ismail Dzhamayev's body was among the remains of six bodies found at the cemetery.

31. On 26 March 2007 the investigation was discontinued on account of the absence of any indication of a crime allegedly committed by servicemen.

2. Relevant information disclosed in relation to the case of Arzu Akhmadova and Others v. Russia, no. 13670/03

32. In their submissions the parties referred to the information provided in relation to the above case. The Court shall set out below the facts relevant to the present case.

33. On 7 April 2002 the Prosecutor's Office of the Chechen Republic answered a request received from Memorial, stating that on 13 March 2002 a criminal investigation had been instituted under Article 105 § 2 (a) of the Russian Criminal Code into the disappearance of 13 residents of Stariye Atagi, including Mr Ismail Dzhamayev, between 6 and 11 March 2002. The letter also stated that:

“On 9 March 2002, at around 3 p.m., a VAZ 21099 vehicle approached a checkpoint of military unit 3179 situated about 4 km away from the outskirts of Stariye Atagi on the road between Chechen-Aul and Stariye Atagi. In response to [the servicemen's] order to stop the car and produce identity papers, shots were fired from the car. During the shoot-out four passengers were killed and the car was burnt. During the examination of the vehicle the remains of a AKM machine gun, a hand grenade launcher and RGD-5 grenades without fuses were found and seized. In this connection, on 12 March 2002 the Prosecutor's Office of the Grozny District initiated criminal proceedings in case no. 56030 under Article 317 of the Russian Criminal Code. The identities of the persons killed in the car have not yet been established.”

34. On 21 August 2002 the military prosecutor of military unit no. 20102 informed the applicants that their allegations that Mr Ismail Dzhamayev and other residents of Stariye Atagi had disappeared during the sweeping operation had been investigated and that criminal proceedings in criminal cases nos. 14/33/0184-02 and 14/33/0185-02 had been instituted in connection with the combats between the servicemen and the members of

the illegal armed groups and as regards the discovery of four bodies bearing signs of a violent death in a burnt car on the road from Chechen-Aul to Stariye Atagi. The letter continued as follows:

“The preliminary investigation established that on 9 March 2002, during the special operation in the village of Stariye Atagi, the servicemen of military unit no. 3228 under the command of Senior Lieutenant Z. were checking vehicles going out of the village of Stariye Atagi, since, in accordance with intelligence received, members of illegal armed groups stationed in Stariye Atagi were planning an attack on this road.

At around 3 p.m. a VAZ 21099 car approached the servicemen of military unit no. 3228 under the command of Z. In reply to the servicemen’s order to stop, machine-gun fire was opened from the car. The servicemen opened return fire with the result that the car started burning. Subsequently three burnt corpses of unidentified persons were found in it.

On 18 May 2002 the criminal proceedings brought in connection with the servicemen’s use of firearms were discontinued...

Accordingly, no involvement on the part of the servicemen in the abduction of [the applicants’ relatives] has ever been established ...”

35. On 9 October 2002 the Prosecutor’s Office of the Grozny District sent the case file to the military prosecutor of military unit no. 20102 for investigation. The case file was given the number 34/33/0657-02.

36. On 26 October 2002 the military prosecutor of military unit no. 20102 suspended the investigation on account of the failure to establish the identity of the culprits. The decision read, in particular:

“During the period from 6 to 10 March 2002, in the course of a special operation in the village of Stariye Atagi, unidentified servicemen abducted thirteen residents of the village: A. P. Akhmadov, S.-S. Kanayev, I. Dzhamayev, I. Kuntayev, I. A. Chagayev, A. Sh. Pokayev, I. S. Magomadov, M. Kh. Isambayev, A. Baysarov, T. S. Khadzhayev, [V. D.], [R. D.], N. Zakayev.

Upon the completion of the operation on 13 March 2002 [V. D.] and [R. D.] were released. The whereabouts of the other residents of Stariye Atagi who were apprehended has not been established...

In the course of the investigative actions ... person(s) who had committed the offence were not identified...”

37. The applicants and relatives of other disappeared persons were notified of the decision to suspend the investigation.

38. On 14 December 2002 the Military Prosecutor’s Office of the United Group Alignment (UGA) quashed the decision to suspend the investigation for the following reasons:

“The decision was unfounded since in the course of the preliminary investigation not all the investigative measures aimed at identifying persons involved in the disappearance of the named residents of Stariye Atagi were taken. [In particular,] the military units that had conducted the special operation in the village were not

identified, the commanders of these units were not questioned, the persons who had conducted a check and apprehended the [disappeared residents] were not identified. Therefore, the preliminary investigation should be reopened.”

39. On 23 December 2002 the case was taken up again by the military prosecutor of military unit no. 20102. Relatives of the disappeared persons were notified of the reopening of the investigation.

40. On 23 January 2003 the military prosecutor of military unit no. 20102 suspended the investigation on account of the failure to identify persons to be charged with the offence. Relatives of the disappeared persons were notified of the decision to suspend the investigation.

41. By letter of 18 March 2003 the military prosecutor of military unit no. 20102 replied to a query lodged by the SRJI on the applicants’ behalf and stated that in the file of criminal case no. 56031 opened in relation to the abduction of Mr Ismail Dzhamayev and other persons there was no indication that the federal servicemen had been involved in the alleged offence.

42. On 2 April 2003 the military prosecutor of military unit no. 20102 notified the SRJI that the case file of the investigation instituted in connection with the disappearance of Mr Ismail Dzhamayev and other persons had been returned to the Prosecutor’s Office of the Chechen Republic, as the military prosecutor had no competence over the case in the absence of evidence of the military personnel’s involvement in the alleged offence.

43. On 26 June 2003 the military prosecutor of military unit no. 20102 quashed the decision of 23 January 2003 and reopened the investigation. Relatives of the disappeared persons were notified of the reopening.

44. On 27 July 2003 the military prosecutor of military unit no. 20102 suspended the investigation on account of the failure to identify persons to be charged with the offence. Relatives of the disappeared persons were notified of the decision.

45. On 7 August 2003 the SRJI applied to the Military Prosecutor’s Office of the UGA requesting, *inter alia*, exhumation of the remains of the unidentified bodies buried by the residents of Stariye Atagi in a common grave and a forensic examination with a view to their identification.

46. On 29 October 2003 the Military Prosecutor’s Office of the UGA quashed the decision of 27 July 2003 to suspend the investigation on the ground that the whereabouts of unspecified witnesses had been established which required further investigative actions. Relatives of the disappeared persons were notified of the reopening.

47. On 19 March 2004 the Military Prosecutor’s Office of the UGA suspended the investigation. The decision read, in particular:

“During the period from 6 to 13 March 2002 servicemen from the internal troops of the Ministry of the Interior and the Ministry of the Defence, officials of the Ministry of the Interior and the FSB conducted a special operation in the village of Stariye

Atagi... aimed at the identification, arrest and extermination of members of an illegal armed group and the search for four servicemen of the FSB who had gone missing.

...

During the period when the special operation was being conducted unidentified persons in camouflage uniform accompanied by cars and armoured vehicles abducted [the following] residents of Stariye Atagi: A. P. Akhmadov, S.-S. Kanayev, I. Dzhamayev, I. Kuntayev, I. A. Chagayev, A. Sh. Pokayev, I. S. Magomadov, M. Kh. Isambayev, A. Baysarov, T. S. Khadzhayev, A. N. Zakayev.

Taking into account that the term of the preliminary investigation has expired and that the investigative measures that could be taken in the absence of a suspect have been completed, [the investigation should be suspended].”

48. Relatives of the disappeared persons were notified of the decision to suspend the investigation.

49. On 22 May 2004 the Military Prosecutor’s Office of the UGA quashed the decision and reopened the investigation. Relatives of the disappeared persons were informed accordingly.

50. On 22 June 2004 the Military Prosecutor’s Office of the UGA again suspended the investigation. The decision read, in so far as relevant:

“During the period from 6 to 13 March 2002 servicemen from the internal troops of the Ministry of the Interior and the Ministry of the Defence, officials of the Ministry of the Interior and the FSB conducted a special operation in the village of Stariye Atagi... aimed at the identification, arrest and extermination of members of an illegal armed group and the search for four servicemen of the FSB who had gone missing.

...

At around 4 p.m. on 9 March 2002 in Stariye Atagi servicemen of military unit 3179 killed three members of the illegal armed group who were in a car. [Their] bodies were severely damaged and burnt. No measures were taken to identify them.

At the same time, according to applications and statements by residents of Stariye Atagi, during the period when the special operation was being conducted unidentified persons in camouflage uniform accompanied by cars and armoured vehicles abducted A. P. Akhmadov, S.-S. Kanayev, I. Dzhamayev, I. Kuntayev, I. A. Chagayev, A. Sh. Pokayev, I. S. Magomadov, M. Kh. Isambayev, A. Baysarov, T. S. Khadzhayev, A. N. Zakayev.

In the course of the investigation the bodies of the members of the illegal armed groups buried in the cemetery of Stariye Atagi were exhumed and body tissue taken from them; blood samples were taken from relatives of the abducted persons. According to the medical opinion no. 52/2004, the forensic (molecular-genetic) expert examination showed that the remains found at the cemetery were those of I. A. Chagayev, A. Sh. Pokayev, S.-S. Kanayev, I. Dzhamayev, A. P. Akhmadov and I. S. Magomadov...

Taking into account that the term of the preliminary investigation has expired and that the investigative measures that could be taken in the absence of a suspect have been completed, [the investigation should be suspended].”

51. On 6 November 2004 the Military Prosecutor’s Office of the UGA quashed the decision and reopened the investigation. Relatives of the disappeared persons were informed accordingly.

52. On 6 December 2004 the Military Prosecutor’s Office of the UGA suspended the investigation again. Relatives of the disappeared persons were notified of the decision.

53. On 10 January 2006 the Military Prosecutor’s Office of the UGA quashed the decision of 6 December 2004 and reopened the investigation on the following grounds:

“In the course of the investigation significant discrepancies between statements by residents of Stariye Atagi and servicemen concerning the detention of the [disappeared] persons and their possible death as a result of the fighting on 7 and 9 March 2002 ... were not resolved. Witness statements in this regard were not duly verified and recorded.

The investigating authorities did not take comprehensive measures in order to establish the specific places where the bodies of A. P. Akhmadov, S.-S. Kanayev, I. Dzhamayev, I. A. Chagayev, A. Sh. Pokayev, and I. S. Magomadov, who, according to their relatives, had been apprehended together with the other residents of the village, had been found.

Up until now the whereabouts and the fate of other residents of Stariye Atagi who have been missing since the operation was conducted in March 2002 have not been established.

In such circumstances the decision to suspend the preliminary investigation should be quashed and the investigation resumed.”

54. On 9 September 2006 the Military Prosecutor’s Office of the UGA ordered another forensic molecular-genetic expert examination aimed at establishing the fate of several other disappeared persons. The order contained the following passage:

“...In the course of the operation a house situated in Nagornaya Street was shelled and blown up, a red VAZ 21099 car with members of an illegal armed group in it was burned and crushed by an APC. ...”

C. The Court’s request for the case file

Despite specific requests made by the Court to submit a copy of the file in criminal case no. 56031 (at present no. 34/00/0014-03), the Government did not provide any documents from the case file. They stated 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 or other participants in the criminal proceedings. At the same time the Government suggested that a Court delegation could have access to the file at the place where the preliminary investigation was being conducted, with the exception of documents of a confidential nature and without the right to make copies.

II. RELEVANT DOMESTIC LAW

1. The Code of Criminal Procedure

55. Until 1 July 2002 criminal-law matters were governed by the 1960 Code of Criminal Procedure of the RSFSR (Russian Soviet Federative Socialist Republic). On 1 July 2002 the old Code was replaced by the Code of Criminal Procedure of the Russian Federation.

56. Article 125 of the new CCP lays down a judicial procedure for the consideration of complaints. Orders of an investigator or prosecutor refusing to institute criminal proceedings or to terminate a case, and other orders and acts or omissions which are liable to infringe the constitutional rights and freedoms of the parties to criminal proceedings or to impede a citizen's access to justice may be appealed against to a local district court, which is empowered to check the lawfulness and grounds of the impugned decisions.

57. Article 161 of the new CCP prohibits the disclosure of information from the preliminary investigation file. Under part 3 of the Article, information from the investigation file may be divulged only 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 parties to the criminal proceedings or prejudice the investigation. Divulging information about the private lives of parties to criminal proceedings without their permission is prohibited.

2. Legislation applicable to counter-terrorist operations

58. Federal Law no. 130-FZ of 25 July 1998 on the Suppression of Terrorism (*Федеральный закон от 25 июля 1998 г. № 130-ФЗ «О борьбе с терроризмом»*) provides as follows:

Section 3. Basic Concepts

“For the purposes of the present Federal Law the following basic concepts shall be applied:

... ‘suppression of terrorism’ shall refer to activities aimed at the prevention, detection, suppression and minimisation of the consequences of terrorist activities;

‘counter-terrorist operation’ shall refer to special activities aimed at the prevention of terrorist acts, ensuring the security of individuals, neutralising terrorists and minimising the consequences of terrorist acts;

‘zone of a counter-terrorist operation’ shall refer to an individual terrain or water surface, means of transport, building, structure or premises with adjacent territory where a counter-terrorist operation is conducted; ...”

Section 13. Legal regime in the zone of an anti-terrorist operation

“1. In the zone of an anti-terrorist operation, the persons conducting the operation shall be entitled:

... (2) to check the identity documents of private persons and officials and, where they have no identity documents, to detain them for identification;

(3) to detain persons who have committed or are committing offences or other acts in defiance of the lawful demands of persons engaged in an anti-terrorist operation, including acts of unauthorised entry or attempted entry to the zone of the anti-terrorist operation, and to convey such persons to the local bodies of the Ministry of the Interior of the Russian Federation;

(4) to enter private residential or other premises ... and means of transport while suppressing a terrorist act or pursuing persons suspected of committing such an act, when a delay may jeopardise human life or health;

(5) to search persons, their belongings and vehicles entering or exiting the zone of an anti-terrorist operation, including with the use of technical means; ...”

Section 15. Informing the public about terrorist acts

“...2. Information that cannot be released to the public includes:

(1) information disclosing the special methods, techniques and tactics of an anti-terrorist operation; ...

(4) information on members of special units, officers of the operational centre managing an anti-terrorist operation and persons assisting in carrying out such operation.

Section 21. Exemption from liability for damage

In accordance with the legislation and within the limits established by it, damage may be caused to the life, health and property of terrorists, as well as to other legally-protected interests, in the course of conducting an anti-terrorist operation. However, servicemen, experts and other persons engaged in the suppression of terrorism shall be exempted from liability for such damage, in accordance with the legislation of the Russian Federation.”

59. Federal Law no. 1026-1 of 18 April 1991 on the Police governs various aspects of the police service.

60. Presidential Decree no. 1255c of 23 September 1999 on Measures Enhancing the Efficiency of Counter-Terrorist Operations in the Territory of the North Caucasia Region provides for the creation of the UGA and contains general provisions concerning its structure and operation. It also provides for additional measures to be taken by local authorities and the FSB to maintain public order and security in the region.

THE LAW

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

A. The parties' submissions

61. The Government contended that the application should be declared inadmissible for non-exhaustion of domestic remedies, since the applicants had failed to challenge either before a higher prosecutor or a court any actions or omissions of the investigating authorities during the investigation, as provided by Chapter 16 of the Code of Criminal Procedure, and to appeal against the decision of 26 March 2007 to discontinue the investigation. They also pointed out that the applicants had not lodged a claim for compensation of non-pecuniary damage under Articles 1067-69 of the Civil Code.

62. The applicants disputed that objection. They maintained that they had exhausted all domestic remedies which could be adequate and effective. The applicants submitted that the criminal-law remedies invoked by the Government were not effective in the Chechen Republic. They pointed out that applicants in other cases raising similar issues had lodged complaints under Article 125 of the Code on Criminal procedure, but that these had been to no avail. The applicants submitted, furthermore, that they were not provided with a copy of the decision of 26 March 2007 to discontinue the investigation, which was not furnished to the Court either, and, therefore, could not have appealed against it. The applicants further argued that the civil-law remedies relied on by the Government could not be considered effective since their outcome would depend on the results of the criminal investigation.

B. The Court's assessment

63. The Court will examine the arguments of the parties in the light of the provisions of the Convention and its relevant practice (for a relevant summary, see *Estamirov and Others v. Russia*, no. 60272/00, § 73-74, 12 October 2006).

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

65. As regards a civil action to obtain redress for damage sustained through the alleged illegal acts or unlawful conduct of State agents, the Court has already found in a number of similar cases that this procedure alone cannot be regarded as an effective remedy in the context of claims brought under Article 2 of the Convention. A civil court is unable to pursue any independent investigation and is incapable, without the benefit of the conclusions of a criminal investigation, of making any meaningful findings regarding the identity of the perpetrators of fatal assaults or disappearances, still less of establishing their responsibility (see *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, §§ 119-21, 24 February 2005, and *Estamirov and Others*, cited above, § 77). In the light of the above, the Court confirms that the applicants were not obliged to pursue civil remedies.

66. As regards criminal-law remedies, the Court observes that the applicants complained to the law-enforcement authorities immediately after the abduction of Mr Ismail Dzhamayev and that an investigation has been pending since 13 March 2002. The applicants and the Government dispute the effectiveness of this investigation.

67. The Court considers that this limb of the Government's preliminary objection raises issues concerning the effectiveness of the criminal investigation which are closely linked to the merits of the applicants' complaints. Thus, it considers that this objection should be joined to the merits and falls to be examined below under the substantive provisions of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

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

“1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

A. The parties’ submissions

69. The Government referred to the results of the forensic examination according to which the remains of Mr Ismail Dzhamayev had been found at the cemetery where bodies of the illegal armed groups’ members killed on 7 and 9 March 2002 had been buried. They submitted that he had been involved in the fight on 9 March 2002. The Government stated that the special operation conducted in Stariye Atagi between 6 and 13 March 2002 had been properly planned and carried out by competent State bodies in compliance with the applicable legislation, in particular with Federal Law no. 130-FZ of 25 July 1998 on Suppression of Terrorism, Federal Law no. 1026-1 of 18 April 1991 on the Police and Presidential Decree no. 1255c of 23 September 1999 on Measures Enhancing the Efficiency of Counter-Terrorist Operations in the Territory of the North Caucasia Region of the Russian Federation. They further submitted that the force applied had been “absolutely necessary” within the meaning of Article 2 of the Convention and, therefore, there had been no breach of the above provision.

70. The applicants reiterated their allegations that Mr Ismail Dzhamayev had been unlawfully apprehended by representatives of the State and then killed. Having been under the control of the authorities, he could not have been involved in the fight on 9 March 2002.

B. The Court’s assessment

1. Admissibility

71. The Court considers, in the light of the parties’ submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. Further, the Court has already found that the Government’s objection concerning the alleged non-exhaustion of domestic criminal remedies should be joined to the merits of the complaint (see paragraph 66 above). The complaint under Article 2 of the Convention must therefore be declared admissible.

2. Merits

(a) The alleged violation of the right to life of Mr Ismail Dzhamayev

i. General principles

72. 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. Detained persons are in a vulnerable position and the obligation on the authorities to account for the treatment of a detained individual 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).

73. The situations where deprivation of life may be justified are exhaustive and must be narrowly interpreted. The use of force which may result in the deprivation of life must be no more than “absolutely necessary” for the achievement of one of the purposes set out in Article 2 § 2 (a), (b) and (c). This term indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is “necessary in a democratic society” under paragraphs 2 of Articles 8 to 11 of the Convention. In assessing the proportionality of the force used the Court must take into consideration not only the actions of State agents who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination (see *McCann and Others v. the United Kingdom*, 27 September 1995, §§ 146-50, Series A no. 324; *Andronicou and Constantinou v. Cyprus*, 9 October 1997, § 171, *Reports of Judgments and Decisions* 1997-VI; and *Oğur v. Turkey* [GC], no. 21594/93, § 78, ECHR 1999-III).

ii. Establishment of the facts

74. The Court observes that it has developed a number of general principles relating to the establishment of facts in dispute, in particular when faced with allegations of disappearance under Article 2 of the Convention (for a summary of these, see *Bazorkina v. Russia*, no. 69481/01, §§ 103-09,

27 July 2006). The Court also notes that the conduct of the parties when evidence is being obtained has to be taken into account (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25).

75. The applicants alleged that on 6 March 2002 Mr Ismail Dzhamayev had been apprehended by Russian servicemen and then disappeared. In this regard the applicants referred to a statement of Mr B., who had been apprehended together with him.

76. The Government confirmed that a special operation had been conducted in Stariye Atagi between 6 and 13 March 2002. However, they submitted that servicemen had not apprehended Mr Ismail Dzhamayev. At the same time the Government stated that he had been killed by servicemen in a fight that had broken out when fire was opened at servicemen near the road between Grozny and Shatoi from a car in which Mr Ismail Dzhamayev was travelling. They referred to the conclusions of the forensic report according to which Mr Ismail Dzhamayev's body was among the remains of persons allegedly killed in the fight on 7 and 9 March 2002.

77. The Court notes that despite its repeated requests for a copy of the investigation file in respect of the abduction of Mr Ismail Dzhamayev, the Government refused to submit the materials requested having produced copies of decisions to suspend and resume the investigation and to grant victim status and of the records of interviews held in March 2002. They relied on Article 161 of the Code of Criminal Procedure. The Court observes that in previous cases it has already found this explanation insufficient to justify the withholding of key information requested by the Court (see *Imakayeva v. Russia*, no. 7615/02, § 123, ECHR 2006-... (extracts)). In view of this and bearing in mind the principles cited above, the Court finds that it can draw inferences from the Government's conduct in this respect.

78. The Court notes, firstly, that it is common ground between the parties that a special operation was conducted in Stariye Atagi between 6 and 13 March 2002. It further notes that, according to the applicants, Mr Ismail Dzhamayev had been apprehended by servicemen during the operation and taken to an unknown destination. They referred in this regard to a statement of Mr B., who had been apprehended together with Mr Ismail Dzhamayev. The Court observes that the applicants did not provide a statement by Mr B. to the Court. However, it notes that, according to the applicants, Mr B. died at the end of 2002, that is, two years before the applicants lodged the present application. This fact is not disputed by the Government. The Court further notes that, according to the applicants, Mr B. reiterated his statement to the investigating authorities and relevant records should be contained in the criminal file. The Government, although having failed to produce any relevant materials, did not contest these submissions either. Accordingly, the Court accepts that Mr B. made a statement confirming that Mr Ismail Dzhamayev had been apprehended by

servicemen in the circumstances described by the applicants. Moreover, less than a month after the completion of the operation the administration of Stariye Atagi issued the applicants with a certificate, confirming that Mr Ismail Dzhamayev had been apprehended by servicemen during the special operation.

79. The Court notes that the Government, in their observations, stated that Mr Ismail Dzhamayev had been killed by servicemen in a fight. However, they barely addressed the applicants' allegations that their relative had been apprehended by servicemen in the first place. In this respect the Government merely noted that the applicants' version of the events was not confirmed by the findings of the investigation. The Court observes, however, that at the early stages of the investigation the applicants' allegation that their relative had been apprehended by servicemen was accepted by the investigating authorities. It refers, in particular, to the decision to suspend the investigation of 26 October 2002 (see paragraph 36 above). At the later stages, in particular in the decision to suspend the investigation of 19 March 2004 and the order to conduct a forensic examination of 9 September 2006 (see paragraphs 47 and 54 above), the investigating authorities did not state expressly that the applicants' family members had been apprehended by servicemen, but referred to "unidentified persons in camouflage uniform accompanied by cars and armoured vehicles". However, the investigation failed to identify those persons.

80. The Court observes that the Government thus did not deny that the applicants' relative had been abducted by armed men and, at the same time, confirmed that a special operation had been conducted in the village on the date of his abduction. The fact that a large group of armed men in uniform, equipped with military vehicles which could not have been available to paramilitary groups, proceeded during a large-scale special operation conducted in the village by the State's forces in broad daylight to apprehend several persons with a view to checking their identity documents, strongly supports the applicants' allegation that these were State servicemen. It further notes that after six years the domestic investigation has produced no tangible results.

81. The Court reiterates that where the applicant makes out a *prima facie* case and the Court is prevented from reaching factual conclusions owing to the lack of the necessary 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).

82. Taking into account the above elements, the Court is satisfied that the applicants have made out a prima facie case that Mr Ismail Dzhamayev was apprehended by State servicemen. The Government's statement that the investigation did not find any evidence to support the allegation of involvement of the special forces in the abduction is insufficient to discharge them from the above-mentioned burden of proof. Drawing inferences from the Government's failure to submit the documents which were in their exclusive possession or to provide a plausible explanation of the events in question, the Court finds it established that Mr Ismail Dzhamayev was apprehended on 6 March 2002 by State servicemen during a security operation in Stariye Atagi.

83. The Court further notes that his burnt body, which was identified more than two years later, was found at one of the two locations of the fights which took place on 7 and 9 March 2002. According to the Government, he was killed by servicemen during the fight on 9 March 2002. The Government have submitted no documents, however, such as military reports, which could enable the Court to establish the exact circumstances of the fight the events that took place between Mr Ismail Dzhamayev's apprehension and his death. However, the Court finds it more appropriate to address this issue below when assessing the State's compliance with Article 2 of the Convention. For the purpose of establishing the facts the Court accepts that Mr Ismail Dzhamayev was killed by servicemen on 9 March 2002.

84. Accordingly, the Court finds that the evidence available permits it to establish to the requisite standard of proof that on 6 March 2002 Mr Ismail Dzhamayev was apprehended by State servicemen and that he was killed by them on 9 March 2002.

iii. The State's compliance with the substantive obligation under Article 2

85. The Court reiterates that in addition to setting out the circumstances when deprivation of life may be justified, Article 2 implies a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework defining the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the relevant international standards (see *Makaratzis v. Greece* [GC], no. 50385/99, §§ 57-59, ECHR 2004-XI, and *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 96, ECHR 2005-VII). Furthermore, the national law regulating policing operations must secure a system of adequate and effective safeguards against arbitrariness and abuse of force and even against avoidable accident (see *Makaratzis*, cited above, § 58). In particular, law-enforcement agents must be trained to assess whether or not there is an absolute necessity to use firearms, not only on the basis of the letter of the relevant regulations, but also with due regard to the

pre-eminence of respect for human life as a fundamental value (see *Nachova and Others*, cited above, § 97).

86. In the present case, it has been acknowledged by the Government that Mr Ismail Dzhamayev was killed by State agents as a result of the intentional use of lethal force against him. The State's responsibility is therefore engaged, and it is for the State to account for the deaths of the applicants' relative. It is notably for the State to demonstrate that the force used against him by the federal servicemen could be said to have been absolutely necessary and therefore strictly proportionate to the achievement of one of the aims set out in paragraph 2 of Article 2.

87. The Court notes that it is faced with conflicting accounts of the events which led to the killing of Mr Ismail Dzhamayev. According to the applicants, after he had been apprehended by the State servicemen on 6 March 2002, the latter had unlawfully killed him and staged the fight on 9 March 2002 so as to justify the killing. According to the Government, the fight on 9 March 2002 had indeed taken place and the applicants' relative had been killed as a result of the use of force which was no more than "absolutely necessary". The Court will address these conflicting accounts below.

88. The Court notes firstly that it is aware of the difficult situation in the Chechen Republic at the material time, which called for exceptional measures on the part of the State to suppress the illegal armed insurgency (see *Isayeva and Others v. Russia*, nos. 57947/00, 57948/00 and 57949/00, § 178, 24 February 2005, or *Khatsiyeva and Others v. Russia*, no. 5108/02, § 134, 17 January 2008). It also does not overlook the fact that an armed conflict, such as that in Chechnya, may entail developments to which State agents are called upon to react without prior preparation. Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the obligation to protect the right to life must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities (see, *mutatis mutandis*, *Makaratzis*, cited above, § 69, and *Mahmut Kaya v. Turkey*, no. 22535/93, § 86, ECHR 2000-III).

89. Turning to the facts of the present case, the Court notes the Government's contention that the special operation conducted in Stariye Atagi between 6 and 13 March 2002 had been properly planned and carried out in compliance with the applicable legislation, in particular with Federal Law no. 130-FZ of 25 July 1998 on Suppression of Terrorism, Federal Law no. 1026-1 of 18 April 1991 on Police and Presidential Decree no. 1255c of 23 September 1999 on Measures Enhancing the Efficiency of Counter-Terrorist Operations in the Territory of the North Caucasia Region of the Russian Federation. The Court leaves open the question whether the legal acts in question constituted an appropriate legal framework for the use of

force and contained clear and sufficient safeguards to prevent arbitrary deprivation of life since, in any event, the Government have failed to demonstrate that the circumstances in which the applicants' relative was killed rendered the use of lethal force against him inevitable.

90. The Court notes that in their observations on the admissibility and merits of the present application the Government provided a concise description of the fight of 9 March 2002, reproduced in paragraph 18 above. The circumstances of the fight were also outlined in certain decisions and letters by the prosecuting authorities, made available to the Court in relation to the case of *Arzu Akhmadova and Others v. Russia*, no. 13670/03, but not in much more detail. However, no documents pertaining to the conduct of the special operation as a whole and of this fight in particular have been submitted to the Court. No military reports on the conduct of the fight with a detailed description of the circumstances which warranted the use of lethal force, orders made in this respect and actions of the servicemen have been made available to the Court. No records of questioning of servicemen who took part in the fight, if such questioning ever took place, have been presented either. Such scarce information on the circumstances in which, according to the Government, Mr Ismail Dzhamayev was killed clearly could not constitute sufficient justification for the use of lethal force.

91. In particular, the Government submitted that on 9 March 2002 a group of servicemen was fired at from a car that was approaching a checkpoint within three kilometres of Stariye Atagi. As the servicemen fired back, the car was set on fire and the three members of illegal armed groups in it were killed. The letter of the Prosecutor's Office of the Chechen Republic of 7 April 2002 stated in this respect that on 9 March 2002 a VAZ 21099 car had approached a checkpoint of military unit no. 3179 situated about 4 km away from the outskirts of Stariye Atagi on the road between Chechen-Aul and Stariye Atagi. In response to the order to stop the car and produce identity papers, shots had been fired from the car. During the shoot-out four passengers had been killed and the car had been burnt. In the course of the subsequent examination of the car the remains of an AKM machine gun, a hand grenade launcher and RGD-5 grenades without fuses had been found and seized. According to the letter of the military prosecutor of military unit no. 20102 of 21 August 2002, at around 3 p.m. on the date in question a VAZ 21099 car had approached the servicemen of military unit no. 3228. In reply to their order to stop, machine-gun fire had been opened from the car. The servicemen had opened return fire which had set the car on fire. Subsequently three burnt corpses of unidentified persons had been found in it. The decision of the Military Prosecutor's Office of the UGA to suspend the investigation of 19 March 2004 stated, *inter alia*, that at around 4 p.m. on 9 March 2002 in Stariye Atagi servicemen of the unit 1 pSpN had killed three members of the illegal armed group who had been in a car and resisted with arms. In the decision of the Military Prosecutor's

Office of the UGA of 9 September 2006 to conduct a forensic examination it was noted that in the course of the special operation conducted in Stariye Atagi a red VAZ 21099 car with members of an illegal armed group in it had been burnt and crushed by an APC.

92. The Court notes the discrepancies contained in the Government's submissions and the letters and decisions of the prosecuting authorities concerning the number of persons killed in the car on 9 March 2002. It further observes that, as can be seen from the information submitted, the fire was opened from the car which disregarded the servicemen's order to stop and present identity papers. The Court accepts that the opened fire must have posed a danger to the lives of the servicemen at the checkpoint and might have warranted the use of arms in response. However, the information available does not permit it to establish conclusively which weapons were used by the servicemen and which particular actions led to the death of Mr Ismail Dzhamayev, thus precluding the Court from finding that the use of lethal force was in compliance with Article 2 of the Convention. It notes, in particular, that it follows from the decision of the Military Prosecutor's Office of the UGA of 9 September 2006 that the car with several persons in it, which had already been shot at and set on fire, was crushed by an APC, which is further supported by photographs of the car submitted by the applicants. No explanation has been provided to the Court as to why an action as drastic as this was necessary in the circumstances. Accordingly, the Court considers that even assuming that Mr Ismail Dzhamayev was killed in the circumstances described by the Government, the latter have not justified their submission that the use of force was no more than "absolutely necessary".

93. The Court observes that the applicants contended that, having been under the control of the authorities, Mr Ismail Dzhamayev could not have been involved in the fight on 9 March 2002. The Court does not find it necessary to make specific findings in this respect since it has established above that even assuming the Government's version of the events to be correct, they have failed to justify that the lethal force was used in compliance with Article 2 of the Convention. Nevertheless, it cannot but be perplexed, in view of its finding in paragraph 82 above that Mr Ismail Dzhamayev was apprehended by State servicemen and in the absence of any information provided by the Government on his subsequent release or escape, by the submission that – despite being in detention – he somehow managed to procure firearms and a car and engage in a fight with federal forces. No explanation has been provided by the Government in this respect.

94. The Court finds that in the absence of information on the crucial elements mentioned in paragraphs 90-93 above, the Government cannot be regarded as having accounted for the use of lethal force in the circumstances of the present case. It is therefore not persuaded that the killing of Mr Ismail Dzhamayev constituted a use of force which was no more than absolutely

necessary in pursuit of the aims provided for in paragraph 2 of Article 2 of the Convention.

95. There has accordingly been a violation of Article 2 of the Convention in this respect.

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

96. The Court notes at the outset that no documents from the investigation file were disclosed by the Government. It therefore has to assess the effectiveness of the investigation on the basis of the few documents submitted by the applicants and the information about its progress submitted by the Government. The Court will also take into account the relevant information disclosed in relation to the case of *Arzu Akhmadova and Others v. Russia*, no. 13670/03.

97. Turning to the facts of the present case, the Court notes that Mr Ismail Dzhamayev was apprehended on 6 March 2002 during a special operation conducted in Stariye Atagi between 6 and 13 March 2002. The investigation was opened on 13 March 2002. The Court is therefore satisfied that the authorities' reaction was sufficiently prompt.

98. The Court further notes that on an unspecified date within six months of the events Mr B., who had witnessed Mr Ismail Dzhamayev's apprehension, and his mother were questioned. However, it appears that after that a number of crucial steps were either delayed or not taken at all.

99. The Court observes, firstly, that the body of the applicants' relative which was severely burnt was not identified until over two years after the events which led to his death. Not only did the authorities not take any steps to identify the body of their own motion, but no forensic examination was conducted even after one had been requested by the applicants (see paragraphs 21-24 and 45 above) and the body remained unidentified until 17 June 2004. Such a delay, for which no explanation has been provided, could only have significantly impeded the establishment of the exact circumstances of his death.

100. From the materials available to the Court it appears that a number of essential steps were never taken. Most notably, it appears that no witnesses other than Mr B. and his mother were ever questioned. No information, let alone any documents, have been provided to the Court as to which servicemen, if any, were questioned in relation to the incident at the checkpoint on 9 March 2002. Apart from this incident, it appears that no servicemen were questioned with regard to the applicants' allegations that their relative had been abducted in the course of the special operation in Stariye Atagi. Likewise, there is no evidence that the place where Mr Ismail Dzhamayev was apprehended was ever examined. It appears that the filtering point at the poultry yard and the mill on the outskirts of the village were not examined either. Furthermore, it appears that the officials of the local administration which provided the applicants with a certificate

confirming that their relative had been apprehended by servicemen during the special operation were never questioned either.

101. The Court observes that in the present case the investigating authorities not only did not comply with the obligation to exercise exemplary diligence and promptness in dealing with such a serious crime (see *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 86, ECHR 2002-II), but failed to take the most elementary investigative measures.

102. The Court further notes that, according to the information available, two of the applicants were granted victim status, although it is not clear who exactly. In any event, the applicants were not informed of any significant developments in the investigation, apart from several decisions to suspend and resume it. It appears that they were not even provided with a copy of the decision of 26 March 2007 to discontinue the investigation. Accordingly, the investigators failed to ensure that the investigation received the required level of public scrutiny and to safeguard the interests of the next of kin in the proceedings.

103. Lastly, the Court notes that the investigation was adjourned and resumed several times. Such a manner of proceeding was not conducive to ensuring the accountability of the servicemen responsible for the abduction of the applicants' relative and involved in the incident of 9 March 2002.

104. Having regard to the Government's preliminary objection that was joined to the merits of the complaint, the Court observes that the applicants, having no access to the case file and not being properly informed of the progress of the investigation, could not have effectively challenged the actions or omissions of the investigating authorities before a court. Furthermore, the investigation was resumed by the prosecuting authorities themselves a number of times due to the need to take additional investigative measures (see, in particular, paragraphs 38 and 53). However, they still failed to investigate the applicants' allegations properly. Moreover, owing to the time that had elapsed since the events complained of, certain investigative steps that ought to have been carried out much earlier could no longer usefully be conducted. Therefore, it is highly doubtful that the remedy relied on would have had any prospects of success. This applies even more so to the decision of 26 March 2007 to discontinue the investigation, which was not provided either to the applicants or to the Court. Therefore, the Court finds that the remedy relied on by the Government was ineffective in the circumstances and rejects their preliminary objection in this respect.

105. In the light of the foregoing, the Court finds that the authorities failed to carry out an effective criminal investigation into the circumstances surrounding the abduction and subsequent death of Mr Ismail Dzhamayev in breach of Article 2 under its procedural head. Accordingly, there has been a violation of Article 2 on this account also.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

106. The applicants relied on Article 3 of the Convention, submitting that as a result of their relative's disappearance and the State's failure to investigate it properly, they had endured mental suffering in breach of Article 3 of the Convention. They also stated that it was highly probable that Mr Ismail Dzhamayev had been subjected to treatment contrary to Article 3 of the Convention, which reads as follows:

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

A. The parties' submissions

107. The Government disagreed with these allegations and argued that the investigation had not established that either the applicants or Mr Ismail Dzhamayev had been subjected to treatment prohibited by Article 3 of the Convention.

108. In their observations on the admissibility and merits of the application the applicants submitted that they no longer wished to have the complaint regarding the alleged ill-treatment of Mr Ismail Dzhamayev examined. They further reiterated the complaint concerning the mental suffering endured.

B. The Court's assessment

1. Admissibility

(a) The complaint concerning the ill-treatment of Mr Ismail Dzhamayev

109. The Court, having regard to Article 37 of the Convention, finds that the applicants do not intend to pursue this part of the application, within the meaning of Article 37 § 1 (a). The Court also finds no reasons of a general character, affecting respect for human rights, as defined in the Convention, which require further examination of the present complaints by virtue of Article 37 § 1 of the Convention *in fine* (see, for example, *Chojak v. Poland*, no. 32220/96, Commission decision of 23 April 1998, unpublished; *Singh and Others v. the United Kingdom* (dec.), no. 30024/96, 26 September 2000; and *Stamatios Karagiannis v. Greece*, no. 27806/02, § 28, 10 February 2005).

110. It follows that this part of the application must be struck out in accordance with Article 37 § 1 (a) of the Convention.

(b) The complaint concerning the applicants' mental suffering

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

2. Merits

112. 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 applicants a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the 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).

113. The Court notes that the applicants are close relatives of Mr Ismail Dzhamayev. After unidentified bodies had been found in Stariye Atagi following the incidents on 7 and 9 March 2002, the applicants themselves tried to secure their identification. However, despite their efforts not only did the authorities refuse to conduct a forensic examination, but on 1 April 2002 returned the severely decomposed bodies wrapped in bags to the applicants on the ground that the refrigerators in the forensic examination department had been out of order. The applicants had to bury the bodies themselves. Over two years later, after the forensic examination had eventually been conducted, they learned that among those bodies were the disfigured remains of their family member. In the Court’s view, such conduct of the authorities demonstrated an astonishing lack of care and respect for both the person killed and his relatives and amounted to inhuman and degrading treatment contrary to Article 3.

114. The Court therefore concludes that there has been a violation of Article 3 of the Convention in respect of the applicants.

IV. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

115. The applicants further stated that Mr Ismail Dzhamayev had been detained in violation of the guarantees of Article 5 of the Convention, which reads, in so far as relevant:

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

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

...

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

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

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

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

A. The parties’ submissions

116. In the Government’s opinion, no evidence was obtained by the investigators to confirm that Mr Ismail Dzhamayev had been deprived of his liberty in breach of the guarantees set out in Article 5 of the Convention.

117. The applicants reiterated the complaint.

B. The Court’s assessment

1. Admissibility

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

2. *Merits*

119. The Court has previously noted the fundamental importance of the guarantees contained in Article 5 to secure the right of individuals in a democracy to be free from arbitrary detention. It has also stated that unacknowledged detention is a complete negation of these guarantees and discloses a very grave violation of Article 5 (see *Çiçek v. Turkey*, no. 25704/94, § 164, 27 February 2001, and *Luluyev and Others v. Russia*, no. 69480/01, § 122, ECHR 2006-... (extracts)).

120. The Court has found it established that State servicemen apprehended Mr Ismail Dzhamayev on 6 March 2002. He was killed by servicemen on 9 March 2002, and no information has been provided by the State concerning his possible release and escape between the dates of his apprehension and the date of his death. His detention was not acknowledged, was not logged in any custody records and there exists no official trace of his whereabouts between his apprehension and killing. 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 and 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).

121. In view of the foregoing, the Court finds that Mr Ismail Dzhamayev was held in unacknowledged detention without any of the safeguards contained in Article 5. This constitutes a particularly grave violation of the right to liberty and security enshrined in Article 5 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

122. The applicants complained that under national law they were barred from filing a civil claim to obtain compensation for their relative's unlawful detention or death pending the outcome of the criminal investigation. They relied on Article 6 § 1 of the Convention, the relevant parts of which provide:

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

A. The parties' submissions

123. The Government disputed this allegation.

124. The applicants made no further submissions.

B. The Court's assessment

1. Admissibility

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

2. Merits

126. The Court finds that the applicants' complaint under Article 6 concerns essentially the same issues as those discussed under the procedural aspect of Article 2 and under Article 13. In these circumstances, the Court finds that no separate issues arise under Article 6 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

127. The applicants complained that they had been deprived of effective remedies in respect of the violations of Articles 2 and 3 of the Convention, contrary to Article 13 of the Convention, which provides:

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

A. The parties' submissions

128. The Government submitted that the applicants could actively participate in the investigation and appeal against actions or omissions of the investigating authorities in court, which they had failed to do. Furthermore, they could have filed claims in respect of non-pecuniary damage, which they had not done either. The Government argued that the applicants thus had effective domestic remedies in respect of their complaints. They referred, in particular, to several decisions by courts of the Chechen Republic delivered in other cases upholding complaints concerning certain actions of investigating authorities or awarding non-pecuniary damages.

129. The applicants argued that in their case the State had failed to conduct an adequate investigation into the abduction and killing of their family member, which undermined the effectiveness of other possible remedies.

B. The Court's assessment

1. Admissibility

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

2. Merits

131. 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. According to the Court's settled case-law, the effect of Article 13 of the Convention is to require the provision of a remedy at national level allowing the competent domestic authority both to deal with the substance of a relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they comply with their obligations under this provision. However, such a remedy is only required in respect of grievances which can be regarded as "arguable" in terms of the Convention (see, among many other authorities, *Halford v. the United Kingdom*, 25 June 1997, § 64, *Reports of Judgments and Decisions* 1997-III).

132. As regards the complaint of lack of effective remedies in respect of the applicants' complaint under Article 2, the Court emphasises that, 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 and infliction of treatment contrary to Article 3, 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, 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 *Khashiyev and Akayeva*, cited above, § 183).

133. In view of the Court's above findings with regard to Article 2, this complaint is clearly "arguable" for the purposes of Article 13 (see *Boyle and Rice v. the United Kingdom*, 27 April 1988, § 52, Series A no. 131). The applicants should accordingly have been able to avail themselves 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.

134. It follows that in circumstances where, as here, the criminal investigation into the violent death has been ineffective and the effectiveness of any other remedy that may have existed, including civil remedies suggested by the Government, has consequently been undermined, the State has failed in its obligation under Article 13 of the Convention.

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

136. As regards the applicants' reference to Article 3 of the Convention, the Court notes that it has found a violation of the above provision on account of the applicants' mental suffering in the period during which the authorities failed to identify the body of their family member and their conduct in this respect. However, the Court has already found a violation of Article 13 of the Convention in conjunction with Article 2 of the Convention on account of the authorities' conduct that led to the suffering endured by the applicants. The Court considers that, in the circumstances, no separate issue arises in respect of Article 13 in connection with Article 3 of the Convention.

VII. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

137. The applicants alleged that they had been discriminated against in the enjoyment of their Convention rights, since the violations of which they complained had taken place on account of their being resident in Chechnya and their ethnic background as Chechens. This was contrary to Article 14 of the Convention, which reads as follows:

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

A. The parties' submissions

138. The Government argued that the allegations were unsubstantiated.

139. The applicants maintained the complaint.

B. The Court's assessment

140. The Court observes that no evidence has been submitted to it that suggests that the applicants were treated differently from persons in an analogous situation without objective and reasonable justification, or that

they have ever raised this complaint before the domestic authorities. It thus finds that this complaint has not been substantiated.

141. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

142. Article 41 of the Convention provides:

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

A. Pecuniary damage

143. The fourth applicant claimed that he had sustained damage in respect of the loss of his father’s earnings following his apprehension and subsequent killing. The fourth applicant claimed a total of 231,520.11 roubles (RUR) under this head (approximately 6,502 euros (EUR)).

144. The fourth applicant claimed that Mr Ismail Dzhamayev had been temporarily unemployed due to the situation in Chechnya. Having regard to the provisions of the Civil Code on the calculation of lost earnings, he claimed that the amount of an unemployed person’s earnings should be equal to the average remuneration of a person with similar qualifications and could not be based on an amount lower than the subsistence level determined by federal laws. He submitted that he was dependent on his father and would have benefited from the latter’s financial support in the amount indicated above, that is, 30% of his earnings. The fourth applicant’s calculations were based on provisions of the Civil Code and the actuarial tables for use in personal injury and fatal accident cases published by the United Kingdom Government Actuary’s Department in 2007 (“the Ogden tables”).

145. The Government argued that no compensation for pecuniary damage should be awarded to the fourth applicant since lethal force had been used against his father in compliance with Article 2 of the Convention.

146. The Court reiterates that there must be a clear causal connection between the damage claimed by the applicants and the violation of the Convention. Furthermore, under Rule 60 of the Rules of Court any claim for just satisfaction must be itemised and submitted in writing together with the relevant supporting documents or vouchers, “failing which the Chamber may reject the claim in whole or in part”. The Court finds that there is indeed a direct causal link between the violation of Article 2 in respect of the fourth applicant’s father and the loss by the fourth applicant of the

financial support which he could have provided for him. It further notes that Mr Ismail Dzhamayev was unemployed. Nevertheless, the Court finds it reasonable to assume that he would eventually have had some earnings and that the fourth applicant would have benefited from them. Having regard to the fourth applicant's submissions, the Court awards him EUR 5,000 in respect of pecuniary damage, plus any tax that may be chargeable on that amount.

B. Non-pecuniary damage

147. The applicants claimed EUR 80,000 jointly in respect of non-pecuniary damage for the suffering they had endured as a result of the loss of their family member, the indifference shown by the authorities towards him and the failure to provide any information about his fate for a long time.

148. The Government found the amount claimed exaggerated.

149. The Court has found a violation of Articles 2, 5 and 13 of the Convention on account of the unacknowledged detention and killing of the applicants' relative. The applicants themselves have been found to have been victims of a violation of Article 3 of the Convention. The Court thus accepts that they have suffered non-pecuniary damage which cannot be compensated for solely by the findings of violations. It awards the applicants jointly EUR 35,000, plus any tax that may be chargeable thereon.

C. Costs and expenses

150. The applicants were represented by the SRJI. They submitted an itemised schedule of costs and expenses that included research and interviews in Ingushetia and Moscow, at a rate of EUR 50 per hour, and the drafting of legal documents submitted to the Court and the domestic authorities, at a rate of EUR 50 per hour for SRJI lawyers and EUR 150 per hour for SRJI senior staff. They also claimed postal expenses in the amount of EUR 26.22, translation expenses in the amount of EUR 76.95, as certified by invoices, and administrative expenses in the amount of EUR 407.75. The aggregate claim in respect of costs and expenses related to the applicants' legal representation amounted to EUR 6,335.92.

151. The Government did not dispute the details of the calculations submitted by the applicants, but pointed out that they should be entitled to the reimbursement of their costs and expenses only in so far as it had been shown that they had been actually incurred and were reasonable as to quantum (see *Skorobogatova v. Russia*, no. 33914/02, § 61, 1 December 2005).

152. The Court has to establish first whether the costs and expenses indicated by the applicants were actually incurred and, second, whether they

were necessary and reasonable (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

153. Having regard to the details of the information available, the Court is satisfied that these rates are reasonable and reflect the expenses actually incurred by the applicants' representatives. Further, it has to be established whether the costs and expenses incurred for legal representation were necessary. The Court notes that this case was rather complex and required a certain amount of research and preparation. Accordingly, it accepts that the expenses incurred were necessary.

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

D. Default interest

155. 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. *Decides* to join to the merits the Government's objection as to non-exhaustion of criminal domestic remedies and *rejects* it;
2. *Declares* the complaints under Articles 2, 3, 5, 6 and 13 of the Convention admissible, *decides* to strike the application out of its list of cases in accordance with Article 37 § 1 (a) of the Convention in so far as it concerns the applicants' complaint under Article 3 of the Convention in respect of Mr Ismail Dzhamayev and *declares* the remainder of the application inadmissible;
3. *Holds* that there has been a violation of Article 2 of the Convention in respect of Mr Ismail Dzhamayev;
4. *Holds* that there has been a violation of Article 2 of the Convention in respect of the failure to conduct an effective investigation into the killing of Mr Ismail Dzhamayev;
5. *Holds* that there has been a violation of Article 3 of the Convention in respect of the applicants;

6. *Holds* that there has been a violation of Article 5 of the Convention in respect of Mr Ismail Dzhamayev;
7. *Holds* that no separate issues arise under Article 6 of the Convention;
8. *Holds* that there has been a violation of Article 13 of the Convention in conjunction with Article 2 of the Convention;
9. *Holds* that no separate issues arise under Article 13 of the Convention in respect of the alleged violation of Article 3;
10. *Holds*
 - (a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, to be converted into Russian roubles at the rate applicable date of settlement, in respect of pecuniary damage to the fourth applicant;
 - (ii) EUR 35,000 (thirty-five thousand euros), plus any tax that may be chargeable, to be converted into Russian roubles at the rate applicable at the date of settlement, in respect of non-pecuniary damage to the applicants jointly;
 - (iii) EUR 6,335.92 (six thousand three hundred and thirty-five euros and ninety-two cents), plus any tax that may be chargeable to the applicants, in respect of costs and expenses, to be paid into the representatives' bank account in the Netherlands;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
11. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 8 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President