



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

FIRST SECTION

CASE OF DZHABRAILOVA v. RUSSIA

(Application no. 1586/05)

JUDGMENT

STRASBOURG

9 April 2009

FINAL

14/09/2009

This judgment may be subject to editorial revision.

In the case of Dzhabrailova v. Russia,

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

Christos Rozakis, *President*,

Anatoly Kovler,

Elisabeth Steiner,

Dean Spielmann,

Sverre Erik Jebens,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 19 March 2009,

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

PROCEDURE

1. The case originated in an application (no. 1586/05) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Ms Yakhita Abdul-Khamidovna Dzhabrailova (“the applicant”), on 1 November 2004.

2. The applicant, who had been granted legal aid, was represented by Mr D. Itsleyev, a lawyer practising in Nazran. The Russian Government (“the Government”) were represented by Ms V. Milinchuk, the former Representative 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 complained of her mental suffering on account of these events. The applicant referred to Articles 2, 3, 5, 6 and 15 of the Convention.

4. On 1 September 2005 the President of the First Section decided to grant priority to the application under Rule 41 of the Rules of Court.

5. On 13 September 2007 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1944 and lives in the village of Goyty in Urus-Martan District in the Chechen Republic.

8. The applicant is the mother of Mr Khanpasha Lechayevich Dzhabrailov, born in 1976. At the material time the applicant, Mr Khanpasha Dzhabrailov, his wife and their three children lived at 24 Shamov Street, Goyty village.

A. The facts

1. Abduction of Mr Khanpasha Dzhabrailov

(a) The applicant's account of events

9. The account below is based on eyewitness statements of the applicant and her daughter, Ms Raisa Dzhabrailova.

10. According to the applicant, the village of Goyty was under the federal forces' control from December 1999. The road leading to and from the village was blocked by federal checkpoints.

11. On 10 April 2003 at around 4 a.m. a khaki UAZ vehicle, a grey UAZ off-road vehicle («таблетка») and a grey bus with a blue stripe arrived at the Dzhabrailovs' house. Around twenty armed men in masks and camouflage uniforms got out of the vehicles; the applicant believed that they belonged to the Russian military because they spoke unaccented Russian and could move freely around the village during the curfew.

12. Around ten servicemen entered the house, woke the Dzhabrailovs and, threatening them with their machine guns, forced them to the floor. Then they seized Mr Khanpasha Dzhabrailov's badge of an employee of a local human rights NGO, grabbed the young man and dragged him to the door. When the applicant and her daughter-in-law asked them where they intended to take Mr Khanpasha Dzhabrailov, the servicemen gave no clear answer but shouted at the women, using mostly swear words. They then blindfolded Mr Khanpasha Dzhabrailov and took him away.

13. Ms Raisa Dzhabrailova followed the servicemen and saw them put Mr Khanpasha Dzhabrailov into the bus and leave in the direction of Urus-Martan.

(b) The Government's account of events

14. According to the Government, on 10 April 2003 at about 4 a.m. a group of at least ten unidentified persons in masks and camouflage uniforms armed with automatic firearms entered the house at 24 Shamov Street in Goyty village, abducted Mr Khanpasha Dzhabrailov and took him away to an unknown destination.

2. Official investigation

15. On 11 April 2003 the applicant complained in writing about her son's abduction to the military commander's office of the Urus-Martan District.

16. On 27 April 2003 the prosecutor's office of the Urus-Martan District ("the district prosecutor's office") instituted an investigation into Mr Khanpasha Dzhabrailov's disappearance under Article 126 § 2 of the Russian Criminal Code (aggravated kidnapping). The case file was given the number 34051.

17. On 30 April 2003 the prosecutor's office of the Chechen Republic ("the republican prosecutor's office") forwarded the applicant's complaint about her son's disappearance to the district prosecutor's office.

18. On 27 June 2003 the district prosecutor's office stayed the investigation for failure to identify those responsible.

19. On 10 June (or September) 2003 the military commander's office of Urus-Martan District informed the applicant in reply to her complaint of 11 April 2003 (see paragraph 15 above) that they had carried out an internal inquiry which had not established Mr Khanpasha Dzhabrailov's whereabouts or the identities of those who had abducted him. They also assured the applicant that they would continue searching for her son.

20. On 10 September 2003 the district prosecutor's office informed the applicant that they had stayed the investigation in case no. 34051 on 27 June 2003 and advised her that she had the opportunity to appeal against that decision.

21. On 30 September 2003 the department of the interior of Urus-Martan District informed the applicant that since 27 May 2003 they had been carrying out search activities in relation to the kidnapping of Mr Khanpasha Dzhabrailov.

22. On 9 December 2003 the republican prosecutor's office forwarded the applicant's complaint about her son's kidnapping to the district prosecutor's office and ordered them to update her on the outcome of the investigation. On 17 December 2003 the district prosecutor's office replied, without specifying the date, that the investigation into Mr Khanpasha Dzhabrailov's kidnapping had been stayed.

23. On 28 January 2004 the district prosecutor's office informed the applicant that the investigation in case no. 34051 had been suspended and

invited her to provide the investigators with any new pieces of relevant information that she might obtain.

24. On 12 July 2004 the republican prosecutor's office informed the applicant that investigative measures were being taken to resolve Mr Khanpasha Dzhabrailov's kidnapping.

25. In a letter of 22 September 2005 the district prosecutor's office informed the applicant's daughter, Ms R. Dzhabrailova, that operational and search activity was under way in criminal case no. 34051 and that she would be notified if any important information emerged.

26. On 15 December 2005 the republican prosecutor's office forwarded Ms R. Dzhabrailova's complaint to the district prosecutor's office with a request for more activity in the investigation, for all necessary measures to be taken to establish the whereabouts of the missing person and for Ms R. Dzhabrailova to be informed of the results of the examination of her complaint.

27. In a letter of 2 January 2006 the district prosecutor's office informed the applicant's daughter that operational and search activity was under way in criminal case no. 34051 opened on 27 April 2003, that during the preliminary investigation the authorities had taken the steps it was possible to take in the absence of the culprits, and that she would be notified if any important information emerged.

28. In a letter of 14 March 2008 the investigator in charge informed Mr L. Dzhabrailov that the investigation in case no. 34051 had been stayed on 4 March 2008 and that it was open to him to challenge this decision in accordance with Articles 124 and 125 of the Russian Code of Criminal Procedure. The letter did not specify the ground on which the investigation had been suspended.

29. According to the applicant, at some point she and her daughter spoke to an official of the district prosecutor's office, who had allegedly said to them that Mr Khanpasha Dzhabrailov had confessed that he had been a participant in illegal armed groups. In the Government's submission, in the criminal investigation file there was a police report, rather than Mr Khanpasha Dzhabrailov's confession, stating that the applicant's son had been a member of illegal armed groups and participated in operations under command of Salman Raduyev, one of the Chechen field commanders. According to the Government, however, this information had not been confirmed during the investigation.

30. In the applicant's submission, since the beginning of 2008 the investigating authorities had visited her house on three occasions and questioned ten witnesses, all of whom had confirmed that Mr Khanpasha Dzhabrailov had been a law-abiding person and had had no enemies.

31. According to the Government, the investigation was repeatedly suspended owing to failure to establish those responsible and then reopened

pursuant to supervising prosecutors' orders, but had been unable to date to identify the alleged perpetrators.

32. In the Government's submission, in course of the investigation the investigating authorities questioned the applicant as well as Mr L. Dzhabrailov and Ms R. Dzhabrailova, who confirmed the circumstances of the incident of 10 April 2003. In particular, the applicant had stated, as alleged by the Government, that on the date in question ten unidentified armed people in masks and camouflage uniforms had arrived at the Dzhabrailovs' address in a grey UAZ off-road vehicle, a UAZ vehicle and a Gazel minibus, put Mr Khanpasha Dzhabrailov in the UAZ off-road vehicle and taken him away. According to the applicant, the other witnesses gave similar oral evidence.

33. According to the Government, the status of victim was granted to Ms Ya. Dzhbrailova – Mr Khanpasha Dzhabrailov's wife – on 26 May 2003, and then to Mr L. Dzhabrailov on 15 June 2004. It does not appear that the applicant has ever been declared a victim in the case.

34. The Government also submitted that the investigating authorities sent enquiries to law-enforcement bodies in the Chechen Republic and further in the Northern Caucasus. According to the replies received by the investigators, no criminal proceedings had ever been brought against Mr Khanpasha Dzhabrailov, he had not been arrested by any of those law-enforcement agencies, nor kept in any detention centres, there was no information as to whether he had participated in illegal armed groups, he had not been found among unidentified corpses and had never applied for assistance to any medical institutions. The replies also stated that the federal forces had not conducted any special operation in the Urus-Martan District on 10 April 2003, and that Mr Khanpasha Dzhabrailov's whereabouts could not be established despite steps taken to find him.

35. In the Government's submission, at present investigative actions are being taken aiming at resolving the crime and punishing those responsible.

3. The applicant's complaints to the judiciary

36. On 26 January 2004 the applicant complained to Urus-Martan Town Court that the investigators were taking no action in case no. 34051. She also requested that she be admitted to the proceedings as a victim and a civil party and be allowed access to the investigation file. It is unclear whether Urus-Martan Town Court replied to that complaint.

37. On 22 March 2004 the applicant complained to the Supreme Court of the Chechen Republic that the investigation was ineffective and requested that she be admitted to the proceedings as a victim and a civil party and be allowed access to the investigation file.

38. On 12 May 2004 the Supreme Court of the Chechen Republic forwarded the applicant's complaint to the prosecutor's office of the

Chechen Republic to be examined in compliance with the subject matter jurisdiction rules.

39. It is unclear whether the applicant's complaints have been examined by domestic courts.

B. The Court's request for the investigation file

40. In September 2007, when the application was communicated to them, the Government were invited to produce a copy of the investigation file in criminal case no. 34051 opened in connection with the abduction of the applicant's son. The Government refused to submit any documents from the file, stating that under Article 161 of the Russian Code of Criminal Procedure disclosure of the documents was contrary to the interests of the investigation and could entail a breach of the rights of the participants in the criminal proceedings. They also submitted that they had taken into account the possibility of requesting 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 the disclosure of confidential information and materials, there were no guarantees concerning compliance by the applicant with the Convention and the Rules of Court.

41. In December 2007 the Court reiterated its request. In reply, the Government again refused to produce any documents from the file for the aforementioned reasons. At the same time, they suggested that a Court delegation could be given access to the file in Russia, with the exception of those documents containing military and State secrets, and without the right to make copies of the case file.

II. RELEVANT DOMESTIC LAW

42. For a summary of the relevant domestic law see *Kukayev v. Russia*, no. 29361/02, §§ 67-69, 15 November 2007.

THE LAW

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

43. The Government argued that the investigation into the abduction of the applicant's son had not been completed, and that therefore the domestic remedies had not been exhausted in respect of her complaints.

44. The applicant called into question the effectiveness of the investigation, stating that it was not an effective remedy for the purposes of Article 35 of the Convention. She also stated that an administrative practice consisting in the authorities' continuing failure to conduct adequate investigations into offences committed by representatives of the federal forces in Chechnya rendered any potentially effective remedies inadequate and illusory in her case. In this connection she relied on the Court's judgements in cases brought by other individuals claiming to be victims of similar violations.

45. The Court considers that the Government's objection as to the exhaustion of domestic remedies raises issues which are closely linked to the question of the effectiveness of the investigation. It therefore decides to join this objection to the merits of the applicant's complaint under the procedural limb of Article 2 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

46. The applicant complained of a violation of the right to life in respect of her son, Mr Khanpasha Dzhabrailov. She submitted that the circumstances of his disappearance and the long period during which it had not been possible to establish his whereabouts indicated that Mr Khanpasha Dzhabrailov had been killed by representatives of the federal forces. The applicant also complained that no effective investigation had been conducted into her son's disappearance. She relied on 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. Admissibility

47. The Court notes that this part of the application 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.

B. Merits

1. Alleged failure to protect the right to life

(a) Submissions by the parties

(i) The applicant

48. The applicant insisted that it was beyond reasonable doubt that on 10 April 2003 her son had been detained by State agents. She argued that at the relevant time the village of Goyty where Mr Khanpasha Dzhabrailov had been apprehended had been under the control of the State, that he had been apprehended during the curfew by a large group of people moving around in UAZ vehicles – the type of vehicle often used by representatives of the federal forces – and a bus of a colour typical of police vehicles, and that those vehicles must have passed federal checkpoints leading to and from the village. The applicant further argued that once informed of the incident of 10 April 2003 the authorities had not made any attempts to search for and arrest the alleged perpetrators, whereas an armed group uncontrolled by the State would usually be pursued and liquidated by the authorities. The applicant contended that the authorities had a motive to detain Mr Khanpasha Dzhabrailov, as, according to an official of the district prosecutor’s office with whom the applicant had talked, her son had apparently been suspected of involvement in the activity of rebel fighters.

49. The applicant pointed out that the Government were not justified in referring to the materials of the investigation in case no. 34051 to corroborate their arguments, given that they had refused to produce a copy of any single document from the file.

50. The applicant further argued that she had been unable to see any insignia on the uniforms of the men who had taken away her son, as it was very often that servicemen of the federal forces or officers of security

agencies bore no insignia at all. She further contradicted the Government's argument that camouflage uniforms could be purchased by anyone. In this respect the applicant contended that immediately after the beginning of military conflict in the Chechen Republic in the autumn of 1999 camouflage uniforms had been withdrawn from unrestricted sale, and subsequently representatives of the federal forces had seized such uniforms and detained private individuals who had them. The applicant thus argued that in 2003 it was only representatives of the federal forces who could have used camouflage uniforms. The applicant also contested the Government's argument that the fact that the alleged perpetrators had Slavic features and spoke Russian could not prove their attachment to the Russian military, as ethnic Russians or Ukrainians had been members of illegal armed groups. She stated in this respect that the Government's allegation of the possible involvement of any such persons in her son's abduction had not been supported by any reliable arguments or evidence.

51. The applicant contended that Mr Khanpasha Dzhabrailov could be presumed dead, given that he had been taken away in life-threatening circumstances, that he had remained missing for several years and that there had been no news of him since the date when he was abducted. She submitted that the Government had advanced no reasons to justify the taking of her son's life, and that therefore they should be held responsible for the violation of Article 2 of the Convention in this respect.

(ii) The Government

52. The Government argued that there were no grounds to hold the State responsible for the alleged violations of Article 2 of the Convention in the present case. They contended that there was no conclusive evidence that the applicant's son was dead, as his corpse had never been found, and that the investigation had obtained no evidence that representatives of the State had been involved in his abduction. They referred, in particular, to the replies of various State bodies obtained by the investigating authorities to the effect that none of those bodies had detained Mr Khanpasha Dzhabrailov or brought criminal proceedings against him, that he was not held in any detention centres, and that no special operations had been conducted in Goyty during the relevant period.

53. The Government contended that the authorities had no motive to detain Mr Khanpasha Dzhabrailov, whereas private individuals could have had such motives, such as revenge. In this connection, the Government alleged that the criminal investigation file contained a report on Mr Khanpasha Dzhabrailov's personality drawn up by a district police officer of the village of Goyty, from which it followed that the applicant's son had had poor relations, and conflicts, with his neighbours and other residents of Goyty.

54. The Government further argued that the applicant had not given any reliable evidence to corroborate her allegations concerning the involvement of State agents in the abduction. In particular, the applicant and other eyewitnesses to the abduction had not indicated whether the camouflage uniforms worn by the abductors had borne any insignia of the type that should normally appear on uniforms of State agents. Moreover, it was only the applicant, her daughter and daughter-in-law who had stated that the abductors had arrived in vehicles, whilst, in the Government's submission, none of their neighbours had seen the perpetrators and had learnt of the abduction of the applicant's son the next morning from his relatives.

55. The Government also pointed out to the alleged contradictions between the applicant's account of the events of 10 April 2003 submitted to the Court and her statements concerning the incident made to the domestic authorities. In particular, whilst in her submissions to the Court the applicant claimed that the alleged perpetrators had arrived in a group of twenty persons in a khaki UAZ vehicle, a grey UAZ off-road vehicle and a grey bus with a blue stripe, in her witness interview to the domestic authorities the applicant stated that there had been around ten alleged perpetrators who had been driving a grey UAZ vehicle, a UAZ vehicle and a Gazel minibus. In the Government's opinion, such discrepancies indicated that the applicant was pursuing an aim of discrediting the Russian federal forces, persuading the Court of their involvement in the abduction and of receiving monetary compensation for the alleged violations.

56. Lastly, the Government submitted that groups of Ukrainian or ethnic Russian mercenaries had participated in the armed conflict together with Chechen rebel fighters and committed crimes in the territory of the Chechen Republic; thus, the fact that the perpetrators had Slavic features and spoke Russian could not prove their attachment to the Russian military. The Government also alleged that a considerable number of weapons had been stolen by illegal armed groups from Russian arsenals in the 1990s and that anyone could purchase masks, camouflage uniforms and firearms.

(b) The Court's assessment

57. The Court reiterates that, in the light of the importance of the protection afforded by Article 2, it must subject deprivation of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. 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 under 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).

58. 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 Mr Khanpasha Dzhabrailov was abducted from his home by men in masks and camouflage uniforms armed with automatic firearms in the early morning of 10 April 2003. It has therefore first to be established whether the armed men belonged to the federal armed forces.

59. The Court notes at the outset that despite its repeated requests for a copy of the investigation file concerning the abduction of Mr Khanpasha Dzhabrailov 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.

60. It further considers that the applicant presented a coherent and consistent picture of her son's abduction on 10 April 2003. The applicant, an eyewitness to the events in question, stated 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 early morning and had spoken Russian without an accent. Moreover, the applicant and her daughter – another eyewitness to the events under examination – consistently stated to the domestic authorities, as acknowledged by the Government, and before the Court, that the abductors had arrived in several vehicles (see paragraph 32 above). The Court further notes the applicant's arguments, none of them being disputed by the Government, that at the material time the area where her son had been apprehended had been under the control of the State, that the incident had taken place during the curfew and that the perpetrators must have passed through federal checkpoints blocking the road leading to and from the village of Goyty. In the Court's opinion, the fact that a group of armed men in camouflage uniforms, equipped with machine guns and several vehicles and able to move freely during the curfew and to take a person from his home in a town area presumably under the control of the

federal forces strongly supports the applicant's allegation that they were State agents.

61. 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 crucial 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).

62. 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 some private individuals in the abduction of Mr Khanpasha Dzhabrailov, given that this allegation was not specific and was not supported by any materials. Drawing inferences from the Government's failure to submit any 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 Mr Khanpasha Dzhabrailov was detained on 10 April 2003 by State agents.

63. 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 Mr Khanpasha Dzhabrailov's disappearance, dragging on for over five 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 detained.

64. 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 *Luhuyev 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 Mr Khanpasha Dzhabrailov or any news of him for over five 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 Mr Khanpasha Dzhabrailov went missing, the Court

finds that he must be presumed dead following unacknowledged detention by State agents.

65. In the absence of any plausible explanation on the part of the Government as to the circumstances of Mr Khanpasha Dzhabrailov'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.

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

2. Alleged inadequacy of the investigation

(a) Submissions by the parties

67. The applicant submitted that the investigation in the present case had fallen short of the Convention standards. She stated that whilst being informed of the incident of 10 April 2003 on the same date, the authorities only instituted criminal proceedings on 27 April 2003. Since then the investigation had been pending for over five years but brought no tangible results.

68. The applicant argued that the authorities had failed to search for and question witnesses, save for her and her three relatives, and to perform a number of other important actions. In particular, they had not established and interviewed servicemen who had been on duty on the night of the incident at the federal check-points blocking the road leading to and from Goyty, or officials responsible for observance of the curfew during the relevant period, had not established which unit of federal forces or special agencies had had UAZ vehicles and buses, had not checked where each of those vehicles had been at the night of the incident. Moreover, in the applicant's submission, the investigators had not inspected the scene of the incident until January 2008.

69. The applicant also argued that she was excluded from the criminal proceedings, as despite her efforts she had been denied access to the case file and had not been properly informed of the course of the investigation. In particular, the authorities had failed to send her copies of procedural decisions suspending and reopening the proceedings. The applicant thus claimed that there had been a violation of Article 2 of the Convention, in its procedural aspect, in the present case.

70. The Government argued 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 find Mr Khanpasha Dzhabrailov and to identify those responsible. They submitted that the investigation was being carried out in full compliance with the domestic law and that a large number of investigative actions had been taken, including sending of numerous enquiries to the federal military

and security agencies to verify the possible involvement of federal servicemen in the imputed offence, or to check whether the applicant's son was kept in any detention centres. The investigation was repeatedly suspended and reopened, which, in the Government's view, was evidence of the authorities' effort to resolve the crime rather than of the ineffectiveness of the investigation. According to the Government, the investigation was ongoing at present. The Government also argued that Mr Khanpasha Dzhabrailov's relatives who had been acknowledged as victims in the case had received explanations concerning their procedural rights, and in particular of the opportunity to gain access to the case file upon the completion of the investigation. The Government thus insisted that they had fulfilled their procedural obligation under Article 2 of the Convention.

(b) The Court's assessment

71. 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 is an implicit requirement of promptness and reasonable expedition (see *Yaşa v. Turkey*, 2 September 1998, § 102-04, *Reports of Judgments and Decisions* 1998-VI, and *Mahmut Kaya v. Turkey*, no. 22535/93, §§ 106-07, ECHR 2000-III). 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).

72. In the instant case, the Court observes that some degree of investigation was carried out into the abduction of the applicant's son. It must assess whether that investigation met the requirements of Article 2 of the Convention.

73. In this connection, the Court notes that despite its repeated requests for a copy of the file on the investigation concerning the abduction of Mr Khanpasha Dzhabrailov, the Government refused to disclose any of the documents from that file, referring to Article 161 of the Russian Code of Criminal Procedure. Drawing inferences from the respondent Government's conduct when evidence is being obtained (see *Ireland v. the United Kingdom*, § 161, 18 January 1978, Series A no. 25), the Court, in the light of these inferences, will have to assess the merits of this complaint on the basis of the information on the course of investigation submitted by the Government and the few documents produced by the applicant.

74. The Court observes that although the applicant notified the authorities of the incident of 10 April 2003 the next day (see paragraphs 15 and 19 above), it was not until 27 April 2003 that the criminal proceedings were brought in connection with Mr Khanpasha Dzhabrailov's abduction, that is more than a fortnight after the applicant had lodged her complaint. The Government advanced no explanation for such a delay in a situation where prompt action had been vital.

75. The Court further notes with concern that not only did the Government refuse to produce the case file documents, but they failed also to submit detailed account of relevant events, with the result that the Court it not even able to build a time line of the investigation. Nevertheless, it refers to the Government's assertion that the investigation in case no. 34051 was several times suspended and then resumed pursuant to supervising prosecutors' orders (see paragraph 31 above). Drawing inferences from the Government's failure to submit information on the course of the investigation, the Court considers it plausible to assume that there were certain periods of the authorities' inactivity when no proceedings were pending.

76. Moreover, it is unclear which particular measures the authorities took to investigate the disappearance of the applicant's son, apart from questioning the applicant and two of her family members, Mr L. Dzhabrailov and Ms L. Dzhabrailova, as witnesses or sending enquiries to State bodies. It is not unlikely that a number of essential investigative measures were either delayed or not taken at all. In this connection the Court notes the applicant's argument which remained uncontested by the Government that whilst the investigation had commenced in April 2003, the investigators had not inspected the scene of the incident until January 2008. It is clear that this investigative measure, if it were to produce any meaningful result, should have been taken immediately after the crime was reported to the authorities, and as soon as the investigation commenced. It also does not appear that any fair attempts were made to find any other witnesses, and, in particular, to identify and question servicemen who had been on duty at the federal checkpoints on the

night of the incident, or to perform other investigative actions, as indicated by the applicant (see paragraph 68 above).

77. Lastly, the Court observes that it is unclear whether the applicant was declared a victim in the case concerning her son's disappearance. It can be ascertained from the Government's relevant submissions, assuming they are accurate, that the status of victim had been granted to Mr Khanpasha Dzhabrailov's other relatives, and namely to his wife, Ms Ya. Dzhabrailova, on 26 May 2003 and then to Mr L. Dzhabrailov on 15 June 2004. In any event, the applicant alleged that she or Mr Khanpasha Dzhabrailov's other relatives had not been properly informed of the course of the investigation, or even of the decisions suspending and reopening the proceedings. The Court, noting that the Government did not adduce any documents to refute this allegation by the applicant, considers that Mr Khanpasha Dzhabrailov's relatives were in fact excluded from the criminal investigation into his disappearance.

78. In the light of the foregoing, and with regard to the inferences drawn from the respondent Government's submission of evidence, the Court concludes that the authorities failed to carry out a thorough and effective investigation into the circumstances surrounding the disappearance of Mr Khanpasha Dzhabrailov. It accordingly dismisses the Government's 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

79. The applicant complained that she had serious grounds to believe that her son had been ill-treated while in the hands of the authorities. She further complained that she had suffered severe mental distress and anguish in connection with her son's disappearance and the lack of an adequate response on behalf of the authorities. The applicant referred 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. Alleged ill-treatment of the applicant's son

80. In her observations the applicant indicated that she did not insist on a separate examination of this complaint.

81. The Government argued that the investigation had obtained no evidence that Mr Khanpasha Dzhabrailov had been subjected to treatment prohibited by Article 3 of the Convention.

82. The Court, having regard to Article 37 of the Convention, finds that the applicant does 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 the further examination of the present complaint 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).

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

B. Alleged mental suffering of the applicant

84. The applicant maintained her complaint, stating that she was Mr Khanpasha Dzhabrailov's mother, had witnessed him being abducted and had actively searched for him. She argued that the way the domestic authorities had treated her applications had amounted to treatment in breach of Article 3 of the Convention, given, in particular, that she had not received adequate information concerning the fate of her son or the course of the investigation into his disappearance.

85. The Government, whilst not denying that the abduction of the applicant's son must have caused considerable emotional distress to her, submitted that there was no causal link between the authorities' actions and the applicant's mental and emotional suffering, in the absence of any findings by the domestic investigation confirming the involvement of State agents in the aforementioned offence. According to them, the investigation had obtained no evidence that the applicant had been subjected to treatment prohibited by Article 3 of the Convention.

1. Admissibility

86. The Court notes that this part of the application 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

87. 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).

88. On the facts, the Court observes that the person who went missing in the present case was the applicant’s son. She was an eyewitness to him being taken away. It has now been over five 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 the authorities’ refusal to allow 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.

89. 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.

90. 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

91. The applicant complained that the provisions of Article 5 of the Convention as a whole, relating to the lawfulness of detention and guarantees against arbitrariness, had been violated in respect of Mr Khanpasha Dzhabrailov. Article 5, in its relevant parts, 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.”

92. The applicant maintained her complaint, arguing that her son had been detained in breach of Article 5 of the Convention.

93. In the Government’s submission, the investigation had obtained no evidence to confirm that the applicant’s son had been detained by State agents in breach of the guarantees set out in Article 5 of the Convention. According to them, there was no information in the materials of the investigation file that Mr Khanpasha Dzhabrailov had been held in any detention centres.

A. Admissibility

94. The Court notes that this part of the application 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.

B. Merits

95. 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).

96. It has been established above that Mr Khanpasha Dzhabrailov was abducted by State agents on 10 April 2003 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).

97. 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 abducted 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 Mr Khanpasha Dzhabrailov against the risk of disappearance.

98. Consequently, the Court finds that the applicant's son 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. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

99. Lastly, the applicant relied on Articles 6 and 15 of the Convention without any further explanation.

100. The Court, having regard to all the materials in its possession, finds that Article 15 of the Convention does not come into play in the circumstances of the present case. Furthermore, as regards the applicant's reference to Article 6 of the Convention, the Court finds that this part of the application does not disclose any appearance of a violation of the rights and freedoms set out in this provision. 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.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

101. 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

102. The applicant claimed 90,000 euros (EUR) for herself and Mr Khanpasha Dzhabrailov’s wife and children in respect of non-pecuniary damage for the fear, anguish and distress which they had suffered as a result of their relative’s disappearance.

103. The Government considered this claim to be excessive.

104. The Court firstly notes that it cannot take into account the applicant’s claim in respect of Mr Khanpasha Dzhabrailov’s other relatives since they are not applicants in the present case (see *Kaplanova v. Russia*, no. 7653/02, § 144, 29 April 2008). It further observes that it has found a violation of Articles 2, 3, and 5 of the Convention on account of the unlawful detention and disappearance of Mr Khanpasha Dzhabrailov, the lack of effective investigation into the matter and the applicant’s mental suffering in connection with those events. 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, on an equitable basis, EUR 35,000 to the applicant for non-pecuniary damage, plus any tax that may be chargeable to her on this amount.

B. Costs and expenses

105. The applicant also claimed EUR 4,083 for costs and expenses incurred before the Court. This amount included EUR 3,450 for 23 hours spent by the applicant’s lawyer on preparing and representing her case, EUR 392 for translation expenses and EUR 241 for administrative costs (7% of legal fees). In support of her claim the applicant submitted a contract with her lawyer and an invoice from a translator.

106. The Government pointed out that the applicant was only entitled to reimbursement of costs and expenses that had actually been incurred and were reasonable.

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

108. The Court, having regard to the documents submitted by the applicant, is satisfied that her claim was substantiated. 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 claimed by the applicant's representative, the Court does not find this claim excessive.

109. In these circumstances, the Court awards the applicant the overall amount of EUR 4,083, less EUR 850 already received by way of legal aid from the Council of Europe, 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 representative directly.

C. Default interest

110. 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 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 applicant's complaint under Article 3 of the Convention regarding the alleged ill-treatment of her son;
2. *Joins to the merits* the Government's objection concerning the exhaustion of domestic remedies and rejects it;
3. *Declares* the complaints under Articles 2 and 5 of the Convention and the complaint under Article 3 of the Convention regarding the applicant's mental and emotional suffering admissible and the remainder of the application inadmissible;
4. *Holds* that there has been a violation of Article 2 of the Convention as regards the disappearance of Khanpasha Dzhabrailov;
5. *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 Khanpasha Dzhabrailov;

6. *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;
7. *Holds* that there has been a violation of Article 5 of the Convention in respect of Khanpasha Dzhabrailov;
8. *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, all of which, are to be converted into Russian roubles at the rate applicable at the date of settlement:
 - (i) EUR 35,000 (thirty-five thousand euros) in respect of non-pecuniary damage;
 - (ii) EUR 3,233 (three thousand two hundred and thirty-three euros) in respect of costs and expenses, to be paid to the applicant's representative's bank account;
 - (iii) any tax, including value-added tax, that may be chargeable to the applicant on the above amounts;
9. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 9 April 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President