



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

1959 · 50 · 2009

FIRST SECTION

CASE OF NENKAYEV AND OTHERS v. RUSSIA

(Application no. 13737/03)

JUDGMENT

STRASBOURG

28 May 2009

FINAL

06/11/2009

This judgment may be subject to editorial revision.

In the case of Nenkayev and Others v. Russia,

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

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Khanlar Hajiyeu,

Dean Spielmann,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 7 May 2009,

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

PROCEDURE

1. The case originated in an application (no. 13737/03) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by ten Russian nationals listed below (“the applicants”), on 24 March 2003.

2. The applicants, who had been granted legal aid, 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 Mr P. Laptev and Ms V. Milinchuk, former Representatives of the Russian Federation at the European Court of Human Rights.

3. The applicants alleged, in particular, that their relative, Muslim Nenkayev, had disappeared after having been unlawfully detained by Russian servicemen and that the domestic authorities had failed to carry out an effective investigation into the matter; that Muslim Nenkayev had probably been ill-treated; that they had had no access to court; that the servicemen had unlawfully searched their home; that Muslim Nenkayev’s disappearance had caused them profound mental suffering; and that they had been deprived of effective remedies in respect of the aforementioned violations. The third applicant also complained about his unlawful detention and lack of compensation for it.

4. On 24 October 2005 the Court decided to apply Rule 41 of the Rules of Court.

5. By a decision of 20 March 2008, the Court declared the application partly admissible.

6. The applicants and the Government each submitted further written observations (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicants are:

- 1) Mr Moldi Nazhmudinovich Nenkayev, born in 1952;
- 2) Ms Zura Vakhayevna Nenkayeva, born in 1955;
- 3) Mr Isa Moldiyevich Nenkayev, born in 1977;
- 4) Mr Musa Moldiyevich Nenkayev, born in 1976;
- 5) Mr Ruslan Moldiyevich Nenkayev, born in 1984;
- 6) Mr Apti Moldiyevich Nenkayev, born in 1986;
- 7) Mr Sulim Moldiyevich Nenkayev, born in 1990;
- 8) Mr Islam Moldiyevich Nenkayev, born in 1993;
- 9) Ms Iman Moldiyevna Nenkayeva, born in 1996; and
- 10) Ms Aminat Khasanovna Nenkayeva, born in 1982.

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

8. The first two applicants are spouses and the parents of eight children – the third to ninth applicants and Mr Muslim Moldiyevich Nenkayev, born in 1982. The tenth applicant is the fourth applicant's wife. At the material time Muslim Nenkayev was a serviceman of the Gudermes district office of the interior. The applicants lived in a private house at 84 Pervomayskaya Street, Urus-Martan.

A. Disappearance of Muslim Nenkayev

1. The applicants' account

(a) Abduction of Muslim Nenkayev and the third applicant

9. At about 3 a.m. on 8 June 2002 a group of around twenty-five or thirty masked men in camouflage uniforms forcibly entered the Nenkayevs' house. They were armed with submachine guns with silencers and, swearing profusely, spoke Russian with no accent. The men did not identify themselves, but the applicants inferred that they belonged to the Russian military.

10. The first applicant, who was sleeping in his room, was woken by a blow to the leg from a machine gun butt. He saw several servicemen pointing machine guns at him. One of the servicemen was checking the first applicant's identity papers left on a table. The soldiers asked the first applicant whether his name was Moldi Nenkayev and whether he had sons. The first applicant answered in the affirmative. Then the servicemen asked the first applicant whether he had sons named Musa, Isa and Muslim. The first applicant confirmed that he had. Thereafter one of the servicemen put his machine gun against the first applicant's neck and escorted him to the courtyard and then to another entrance into the house of the Nenkayev family. The door was locked. One of the soldiers pushed a door knob and broke it. The first applicant asked his relatives inside to open the door, and the sixth applicant did so.

11. The servicemen came in with the first applicant in front of them and using him as a shield. About five of them entered a room in which the second and ninth applicants and the first applicant's sister-in-law and her daughter were sleeping. Threatening them with firearms, the servicemen ordered everyone to stay in bed and conducted a search which lasted about an hour.

12. During the search the servicemen seized a service machine gun belonging to the third applicant, who was an officer of the special police unit of the Chechen Republic. One of the servicemen attempted to take away the third applicant's leather jacket but another armed man ordered him to leave it.

13. Another group comprising around ten servicemen entered the room in which the fourth and tenth applicants were sleeping. They forced the fourth applicant out into the corridor and ordered him to lie face down. The tenth applicant was ordered to put her hands behind her head and also to lie down on the floor. Then the military searched the room and took away a leather waistcoat, a leather jacket, a gold ring and perfumes. The tenth applicant heard one of them telling another one to look for diamonds. Ten minutes later they left the room, having ordered the tenth applicant to stay down.

14. Several servicemen entered the room occupied by Muslim Nenkayev, the third, sixth, seventh and eighth applicants and the first applicant's nephew. The servicemen asked for Muslim and Isa Nenkayev. When the two Nenkayev brothers identified themselves, the servicemen ordered them to get dressed and leave the room. The other Nenkayev family members were ordered not to move.

15. Thereafter the servicemen led the first, third and fourth applicants and Muslim Nenkayev into the corridor and, swearing and threatening them with machine guns, ordered them to lie down and keep still. The third applicant tried to explain that he was a police officer and inquired what

authority the servicemen represented and why they had intruded into the Nenkayevs' house. The servicemen left those questions unanswered.

16. The servicemen then declared that they would take away the third applicant and Muslim Nenkayev, handcuffed and blindfolded them. They also covered Muslim Nenkayev's mouth with adhesive tape. They further asked the third applicant whether he had any firearms. The latter replied that as a police officer he had a service pistol and machine gun. The servicemen, who had already seized the third applicant's service machine gun, then took his pistol as well.

17. Thereafter the servicemen ordered the fourth applicant to stay down and took the first and third applicants and Muslim Nenkayev out into the courtyard. When the fourth applicant enquired where his brothers would be taken, the servicemen stated that they were from the Urus-Martan military commander's office and would take the detainees to a local police station.

18. In the courtyard the servicemen asked the third applicant for his identity papers. The latter replied that he had left them in the Nenkayev women's room. The servicemen took the first and third applicants to that room and took the third applicant's identity papers. The women asked the servicemen why they intended to take the third applicant away, but received no answer and were told to keep silent. The servicemen then noticed a machine gun ammunition belt and seized it. Thereafter they covered the third applicant's mouth with adhesive tape and took him outside.

19. The servicemen left the house and escorted the third applicant and Muslim Nenkayev into the street. Muslim Nenkayev was wearing a red T-shirt, black trousers and running shoes. The first applicant attempted to follow his sons, but the military warned him that they would shoot down any member of the Nenkayev family who attempted to stop them taking Muslim Nenkayev and the third applicant away. The first applicant stayed at the gate watching his two sons being taken on foot by the servicemen in the direction of the town centre.

20. The applicants have not seen Muslim Nenkayev since 8 June 2002.

(b) The Nenkayev brothers' detention

21. Even blindfolded, the third applicant managed to get his bearings and realised that they were walking towards the centre of Urus-Martan, where the Urus-Martan military commander's office and the Urus-Martan district administration ("the local administrative authority") were located.

22. According to the third applicant, they walked for some fifty minutes. Then he heard a gate being opened. It was an iron gate, like the one in the military commander's office. They passed through that gate and entered a building. Then the third applicant and his brother were taken upstairs to the first floor and placed in a cell. The servicemen left the Nenkayev brothers blindfolded and handcuffed and went away.

23. Some time later the third applicant heard the sound of footsteps from above and realised that there were more than two floors in the building in which they were being held. The third applicant inferred that he and his brother had probably been taken to the military commander's office, since there were only two buildings comprising more than two floors in the centre of Urus-Martan: the military commander's office and a block of flats, the latter, however, having no fence or gate and being fully occupied by civilians.

24. While in the cell, the third applicant fell asleep on several occasions. When at some point he called his brother, there was no reply. The third applicant assumed that Muslim Nenkayev must have been taken out of the cell while he was sleeping.

25. Then the third applicant heard the cell door being opened and someone asked him in Russian, without an accent, whether he knew why he had been brought there. The third applicant answered in the negative. Thereafter he was questioned for about twenty or thirty minutes. The interviewer told the third applicant that he would be released and that Muslim Nenkayev would be taken to a prosecutor's office and left.

26. Some time later the door opened again and the third applicant was ordered to rise. Somebody grabbed the blindfolded and handcuffed third applicant by the collar and escorted him downstairs and then outside. In the street he was put in the back seat of a car and two persons sat beside him. The car was rather high and the third applicant assumed that it was a UAZ vehicle. The car drove for about fifteen minutes. Then it stopped and the third applicant was taken out and put on the ground, face down. His handcuffs were removed and he was ordered to lie still for ten minutes. After the vehicle had left, the third applicant removed the adhesive tape from his eyes and saw that it was dark in the street. His service machine gun was lying nearby, but his pistol was missing.

27. At 3 a.m. on 9 June 2002 the third applicant returned home.

2. The Government's account

28. The Prosecutor General's Office established that at about 1 a.m. on 8 June 2002 unidentified persons wearing camouflage uniforms and masks and armed with machine guns had entered the house at 84 Pervomayskaya Street, Urus-Martan, and kidnapped Muslim Nenkayev and Isa Nenkayev. The latter had been released the following day.

B. The search for Muslim Nenkayev and the investigation

1. The applicants' account

29. On 8 June 2002 the first applicant visited the local administrative authority to ascertain his missing sons' whereabouts. He talked to Mr L.G., a deputy head, and Mr K., an official of the authority. Both officials stated that the applicants' relatives had been detained by federal troops. Two months later, however, Mr L.G. and Mr K. retracted their earlier statements.

30. About a month after Muslim Nenkayev's arrest, the first applicant talked to another deputy head of the local administrative authority, Mr M., who told him that Muslim Nenkayev had been detained by the Federal Security Service ("FSB"), the Main Intelligence Department ("GRU") and servicemen of the Urus-Martan military commander's office, and then taken to GRU headquarters.

31. On 15 or 20 July 2002 the first applicant talked to Mr L.-A.G., an FSB officer living in Urus-Martan, who told him that representatives of federal forces, namely the GRU, had been involved in the arrest of the Nenkayev brothers.

32. Since 8 June 2002 the applicants have tried to establish Muslim Nenkayev's whereabouts and have repeatedly applied to various State agencies, including prosecutors' offices at different levels, the Urus-Martan district department of the interior ("the ROVD"), the local administrative authority, the Urus-Martan military commander's office, the department of the FSB of the Chechen Republic ("the Chechen FSB") and other authorities. The applicants referred to the facts of the kidnapping of Muslim Nenkayev and the third applicant and asked for assistance and details of the investigation. Mostly their enquiries remained unanswered, or only formal replies were given according to which the requests had been forwarded to various prosecutor's offices "for examination".

33. On 8 July 2002 the South Federal Circuit Department of the Prosecutor General's Office informed the first applicant that his request to establish his son's whereabouts had been transmitted to the prosecutor's office of the Chechen Republic.

34. On 15 July 2002 the Chechen FSB notified the first applicant that his query had been sent to the military prosecutor of military unit no. 20102 ("the unit prosecutor's office").

35. On 17 July 2002 the prosecutor's office of the Chechen Republic forwarded the first applicant's complaint about the Nenkayev brothers' arrest and subsequent disappearance of Muslim Nenkayev to the prosecutor's office of the Urus-Martan District ("the district prosecutor's office").

36. On 15 August 2002 the district prosecutor's office instituted criminal proceedings in connection with "the kidnapping of Isa and Muslim

Nenkayev by unidentified persons in camouflage uniforms”, under Article 126 § 2 of the Russian Criminal Code (aggravated kidnapping), and notified the first applicant accordingly. The file was assigned the number 61116.

37. On 19 August 2002 the unit prosecutor’s office informed the first applicant that law-enforcement agencies of Urus-Martan had not carried out any special operations in June 2002.

38. On 10 September 2002 the National Public Commission for Investigation of Offences and Protection of Human Rights in the North Caucasus requested the military prosecutor’s office of the North Caucasus Circuit (“the North Caucasus prosecutor’s office”) to investigate the first applicant’s allegations of Muslim Nenkayev’s kidnapping by armed federal servicemen in masks and camouflage uniforms, and to search for him. On 25 September 2002 the North Caucasus prosecutor’s office forwarded the request to the unit prosecutor’s office “for a thorough investigation”.

39. On 4 April 2003 the first applicant requested an update on progress in the investigation in case no. 61116 from the district prosecutor’s office. In reply, he was informed on 11 April 2003 that the investigation instituted on 15 August 2002 had been suspended on 15 October 2002 for failure to identify the perpetrators, and that an active search for Muslim Nenkayev and those involved in his kidnapping was under way.

40. By letter of 25 April 2003 the North Caucasus prosecutor’s office informed the first applicant that his request concerning the search for Muslim Nenkayev had been referred to the military prosecutor’s office of the United Group Alignment (“the UGA prosecutor’s office”).

41. On 8 May 2003 the Chief Military Prosecutor’s Office forwarded the applications of several residents of the Chechen Republic relating to the disappearance of their relatives, including that of the first applicant, to the UGA prosecutor’s office for examination.

42. On 12 May 2003 the UGA prosecutor’s office forwarded the first applicant’s request to the unit prosecutor’s office. On the same date the South Federal Circuit Department of the Prosecutor General’s Office informed the first applicant that they had transmitted his complaint about the unlawful detention and subsequent disappearance of his son to the prosecutor’s office of the Chechen Republic.

43. By letter of 9 June 2003 the prosecutor’s office of the Chechen Republic instructed the district prosecutor’s office to conduct “a thorough and full investigation” into the circumstances of the kidnapping of Muslim Nenkayev and the third applicant and verify whether military personnel had been involved.

44. On 17 June 2003 the unit prosecutor’s office notified the first applicant that no involvement of military personnel in the kidnapping of his son had been established.

45. On 11 July 2003 the UGA prosecutor's office transmitted the applications of the first applicant and several other residents of the Chechen Republic concerning the kidnapping of their relatives to the unit prosecutor's office and asked if there was any information concerning the whereabouts of those missing and whether military servicemen had participated in the kidnappings.

46. On 15 July 2003 the prosecutor's office of the Chechen Republic, in reply to the first applicant's complaint that the district prosecutor's office had taken no action, informed him that the criminal proceedings instituted on 15 August 2002 in respect of the kidnapping of his son and suspended on 15 October 2002 had subsequently been resumed on 15 July 2003, since the investigation had been incomplete. The letter also stated that the term for the preliminary investigation had been extended until 15 August 2003, that the search for Muslim Nenkayev and those responsible for his disappearance was in progress and that the prosecutor's office of the Chechen Republic was closely supervising the investigation.

47. By letters of 1 and 19 August 2003 the first applicant requested the district prosecutor's office to update him on the latest developments in the investigation.

48. On 25 August 2003 the first applicant complained to the prosecutor's office of the Chechen Republic that the investigation into the disappearance of his son had been suspended on 25 July 2003, that is before the time-limit for the preliminary investigation, 15 August 2003, and inquired about the results of the investigation.

49. On 15 September 2003 the prosecutor's office of the Chechen Republic notified the first applicant that the investigation had been resumed on 12 September 2003 and that investigative measures were being taken to find Muslim Nenkayev and the culprits.

50. Between August and October 2003 the first applicant tried on four occasions to talk to the head of the ROVD, but the latter was unavailable. At the beginning of October 2003 the first applicant talked to an officer of the ROVD who said that he was trying to find out whether Muslim Nenkayev was being held in any prison, and that he had not achieved any results so far. At some point in October 2003 the first applicant also talked to a deputy military commander of Urus-Martan, who reassured him that the search for his missing son was in progress and that he would be notified of any results.

51. On 21 April 2004 the first applicant requested the district prosecutor's office to take certain investigative measures and to transfer the case file to a military prosecutor's office.

52. On 10 July 2004 the prosecutor's office of the Chechen Republic forwarded the first applicant's complaint to the district prosecutor's office.

53. On 19 August 2004 the unit prosecutor's office informed the applicants that they had carried out an inquiry into the Nenkayev brothers'

kidnapping, which had established no traces of any involvement of military personnel.

54. On 30 November 2004 the district prosecutor's office informed the first applicant that in the course of the investigation into the Nenkayev brothers' kidnapping various measures had been taken but had produced no results.

55. On 30 June 2005 the first applicant requested the district prosecutor's office to update him on progress in the investigation and to resume the proceedings if they had been suspended.

56. On 28 July 2005 the district prosecutor's office informed the first applicant that the investigation had been resumed.

57. On 15 November 2005 the first applicant again requested information on the investigation from the district prosecutor's office.

58. On 16 January 2006 the district prosecutor's office informed the first applicant that the investigation had been resumed.

59. On 16 January 2006 the second applicant was questioned by an investigator of the district prosecutor's office. She claimed that certain items had been stolen from her house on the night of her sons' kidnapping. The investigator refused to insert that piece of information into the record. On the same date the investigator questioned the tenth applicant, who described the circumstances of the Nenkayev brothers' kidnapping and submitted that the perpetrators had stolen her leather waistcoat, her husband's leather jacket and other items. According to the tenth applicant, the investigator did not include that information in the record.

60. On 3 March 2006 the second and tenth applicants requested the prosecutor's office of the Chechen Republic and the district prosecutor's office to investigate the theft of their belongings on the night of their relatives' kidnapping.

61. On 6 March 2006 the district prosecutor's office granted the tenth applicant victim status in case no. 61116 as her belongings had been stolen on the night of 7 to 8 June 2002.

2. Information submitted by the Government

62. On 15 August 2002 the district prosecutor's office opened criminal investigation file no. 61116 into the kidnapping of Muslim Nenkayev and the third applicant, under Article 126 § 2 of the Russian Criminal Code ("aggravated kidnapping").

63. On 9 September 2002 the district prosecutor's office granted the first applicant victim status in the criminal investigation.

64. On 13 September 2002 the district prosecutor's office questioned the third applicant. He described the circumstances of the crime and submitted that his service gun had been stolen.

65. On 15 October 2002 the district prosecutor's office suspended the investigation in case no. 61116 for failure to identify those responsible,

informed the first applicant and instructed the police to carry out certain investigative measures.

66. On 22 June 2003 the district prosecutor's office quashed the decision of 15 October 2002 and resumed the investigation. On 25 June 2003 the first applicant was informed of that decision.

67. On 2 July 2003 the district prosecutor's office sent requests for information concerning Muslim Nenkayev to several penitentiary facilities and law-enforcement agencies in the Urus-Martan District.

68. On 25 July 2003 the district prosecutor's office suspended the investigation and notified the first applicant accordingly.

69. On 12 September 2003 the investigation in case no. 61116 was resumed.

70. On 1 October 2003 the district prosecutor's office sent requests concerning Muslim Nenkayev to several penitentiary institutions located in the south of Russia. No relevant information was received in reply.

71. On 12 October 2003 the district prosecutor's office again suspended the investigation.

72. On 10 November 2003 the prosecutor's office of the Chechen Republic quashed the decision of 12 October 2003 and resumed the investigation.

73. On 15 and 16 November 2003 the district prosecutor's office questioned as witnesses the second and fourth applicants, respectively.

74. On 13 December 2003 the district prosecutor's office suspended the investigation and instructed the ROVD to search for Muslim Nenkayev more actively.

75. On 28 July 2005 the district prosecutor's office resumed the investigation in case no. 61116 and ordered the ROVD to find witnesses to the Nenkayev brothers' kidnapping.

76. On 1 August 2005 the district prosecutor's office questioned the first applicant as a witness.

77. On 28 August 2005 the investigation was again suspended.

78. On 15 November 2005 the district prosecutor's office questioned the second applicant. She stated that on the night of 8 June 2002 she had been awakened by unidentified armed men who had then taken her sons away.

79. On 16 November 2005 the district prosecutor's office resumed the proceedings at the first applicant's request.

80. On 17 November 2005 the district prosecutor's office suspended the investigation for failure to identify the perpetrators.

81. On 13 January 2006 the prosecutor's office of the Chechen Republic quashed the decision of 17 November 2005 and resumed the proceedings.

82. On 16 January 2006 the investigation in case no. 61116 was extended to an offence under Article 226 § 3 of the Russian Criminal Code ("theft of weapons") on account of the theft of the third applicant's gun.

83. On 16 January 2006 the district prosecutor's office questioned as witnesses the second, third and fourth applicants. They also questioned several relatives and acquaintances of the Nenkayev brothers, who said that they had no precise information concerning the perpetrators' identities; nor could they confirm that any belongings had been stolen from the Nenkayevs.

84. On 16 January 2006 the district prosecutor's office questioned the head of the local administrative authority, Mr K., and his deputy. They did not confirm that they had been aware of the Nenkayev brothers' kidnapping; nor did they confirm the fact that the applicants had complained to them about it. Further, Mr L.-A.G. who, according to the first applicant had been an FSB officer, denied that he had known anything about the kidnapping and submitted that he had never been an officer of any law enforcement agency.

85. On 20 February 2006 the seventh applicant was questioned.

86. On 16 February 2006 the district prosecutor's office suspended the investigation in case no. 61116. On the same date the decision on suspension was quashed and the investigation resumed. The first applicant was notified of both decisions.

87. On 3 March 2006 the district prosecutor's office received a request from the second and tenth applicant to investigate the robbery that had occurred on 8 June 2002, to grant them victim status and to join the proceedings to case no. 61116.

88. On 5 March 2006 the district prosecutor's office granted the second and tenth applicants' request in part and admitted the tenth applicant to the proceedings as a victim.

89. On an unspecified date the Central Archives of the Russian Ministry of the Defence informed the investigators that there was no documented information on special operations in Urus-Martan on 8 June 2002 or on Muslim Nenkayev's arrest.

90. On 14 November 2007 the investigators requested all units of the Investigative Committee of the Russian Prosecutor's Office for the Chechen Republic to inform them whether they had any information on criminal proceedings instituted against Muslim Nenkayev, any complaints lodged by him or discovery of his dead body. The replies received were negative.

91. On 14 November 2007 the third applicant was questioned again. He stated that he had been abducted by ten to fifteen masked men in camouflage uniforms armed with machine guns and pistols. He had not examined their faces carefully as he had been blindfolded. He could not identify any of those persons by voice.

92. On 20 November 2007 the first applicant was again questioned and reaffirmed his previous statement.

93. On 26 November 2007 the investigation was suspended for failure to identify those responsible. The first applicant was notified accordingly and the ROVD were instructed to search for the perpetrators more vigorously.

94. On 14 December 2007 the ROVD informed the district prosecutor's office that they were taking measures to solve the crime.

95. On 4 December 2007 the Achkhoy-Martan inter-district prosecutor's office ("the inter-district prosecutor's office") quashed the decision of 26 November 2007, resumed the investigation and notified the first applicant accordingly.

96. On 7 December 2007 the first applicant was again questioned and stated that his two sons had been kidnapped by men armed with sawn-off machine guns with silencers that differed from those used by the military. It was rumoured that Muslim Nenkayev had been kept in the premises of the Urus-Martan Department of the FSB ("the Urus-Martan FSB"), however, there was no evidence of that.

97. On 8 December 2007 the sixth applicant was again questioned and stated that on the night of 8 June 2002 he had been sleeping in the same room as Muslim Nenkayev. At about 3 a.m. someone had knocked on the door; Muslim had opened it and armed and masked men in camouflage uniforms had burst in. The men had spoken Russian and Chechen. Muslim Nenkayev and the third applicant had been forced to the floor. The third applicant's service weapons had been seized. Then the armed men had covered his brothers' mouth with adhesive tape and taken them away, ordering the other Nenkayev family members not to leave the house for ten minutes, threatening to open fire. On the following day the third applicant had been released; his machine gun had been returned while his pistol, bullet-proof jacket and machine-gun bullets had been seized.

98. On 20 December 2007 the investigators sent requests for information on Muslim Nenkayev to numerous penitentiary facilities in the North Caucasus.

99. On 21 and 22 December 2007 three of the applicants' neighbours were questioned and stated that they had heard of Muslim Nenkayev's abduction but had no information on the perpetrators' identities.

100. On 23 January 2008 the inter-district prosecutor's office suspended the investigation and notified the first applicant accordingly.

101. On 28 January 2008 the investigators instructed the ROVD to search for the perpetrators more vigorously, in particular to verify involvement in the crime of illegal armed groups, to establish Muslim Nenkayev's connections and the lifestyle he had led prior to the kidnapping and to verify meticulously any possible implication of the Urus-Martan FSB servicemen in the crime.

102. On 2 February 2008 requests for information on special operations carried out in Urus-Martan on 8 June 2002 were sent to numerous units of the Ministry of the Interior. On the same day information on military units

located in the Urus-Martan District on 8 June 2002 was requested from the military commanders of the Chechen Republic and the Urus-Martan District.

103. On 5 February 2008 a request for information concerning Muslim Nenkayev was sent to the Federal Migration Service.

104. On 19 February 2008 the inter-district prosecutor's office held a conference with departments of the interior for the Urus-Martan District and discussed the investigation in case no. 61116. The ROVD were instructed to take investigative measures more vigorously.

105. On 20 February 2008 the investigators recommended that the ROVD question Muslim Nenkayev's relatives and fellow villagers and examine cemeteries. On 21 February 2008 another instruction to reactivate the investigation was sent to the ROVD.

106. On 21 February 2008 the investigation was suspended and the first applicant was notified accordingly.

107. On 23 February 2008 the ROVD informed the investigators that they were taking measures to solve the crime.

108. On 28 February 2008 the inter-district prosecutor's office requested the district prosecutor's office to assess the effectiveness of the investigation.

109. Requests concerning Muslim Nenkayev were sent to various information centres of the Ministry of the Interior.

110. On 10 April 2008 the inter-district prosecutor's office quashed the decision of 21 February 2008 and resumed the investigation.

111. The investigation in case no. 61116 was ongoing.

112. Despite a specific request by the Court the Government did not submit a copy of the entire file in case no. 61116, providing copies of several decisions to suspend and resume the investigation and to grant victim status. Relying on the information obtained from the Prosecutor General's Office, the Government stated that the investigation was in progress and that disclosure of the documents would be in violation of Article 161 of the 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.

C. Judicial proceedings against investigators

1. The applicants' account

113. On 15 April 2003 the first applicant lodged a complaint against the district prosecutor's office with the Urus-Martan Town Court ("the town court"). He complained that the authorities had failed to conduct an effective investigation into the kidnapping of his sons and sought to have

the decision of 15 October 2002 to suspend the investigation quashed and the criminal proceedings in case no. 61116 resumed.

114. On 31 December 2003 the first applicant requested the town court to notify him of the date on which his complaint of 15 April 2003 would be examined.

115. On 1 March 2004 the first applicant went to the town court and enquired about his complaint. He did not manage to meet the judge, who was absent, but talked to officials of the town court's registry who told him that on 19 April 2004 a letter had been sent to his address. The officials were unable to provide any information as to the contents of that letter.

116. On 25 January 2006 the first applicant went to see the president of the town court. The latter said that the complaint about the investigators had not been examined because of a fire in the town court building, and requested that the first applicant provide him with a copy of the complaint. On the following day the first applicant delivered the required copy to the president of the town court.

2. Information submitted by the Government

117. On 25 April 2003 the town court received the first applicant's complaint against the district prosecutor's office dated 15 April 2003. In the body of the complaint the first applicant's last name was spelled on one occasion as "Nenkev" and then as "Nenkayev". The complaint was not signed.

118. On 28 April 2003 the town court sent a copy of the complaint to the district prosecutor's office and summoned the first applicant. Later the first applicant was repeatedly invited to the town court to sign the complaint properly but never did so.

119. On an unspecified date the town court returned the complaint to the first applicant for failure to sign it.

120. The president of the town court claimed that he had never met the first applicant in person and had not had any conversations with him.

II. RELEVANT DOMESTIC LAW

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

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

A. Arguments of the parties

122. The Government contended that the application should be declared inadmissible for non-exhaustion of domestic remedies, since the investigation into the abduction of Muslim Nenkayev and the third applicant had not yet been completed. They also argued that it had been open to the applicants to challenge in court any actions or omissions by the investigating or other law-enforcement authorities during the investigation. The first applicant could not be considered to have used this remedy because, when lodging the complaint with the town court, he had misspelled his last name as "Nenkev" and had failed to sign his complaint. The Government further argued that the third applicant had not made any complaints concerning his alleged unlawful detention. Lastly, the Government asserted that the applicants had failed to complain about the allegedly unlawful search to the investigators in due time and had not lodged any relevant court actions.

123. The applicants disputed that objection. In their view, the fact that the investigation had been pending for more than six years with no tangible results proved that it was an ineffective remedy in this case. They also asserted that the first applicant's court complaint against the district prosecutor's office had never been examined on the merits, which demonstrated the ineffectiveness of the court remedies relied on by the Government.

B. The Court's assessment

124. In the present case the Court took no decision about the exhaustion of criminal domestic remedies at the admissibility stage, having found that this question was too closely linked to the merits. It will now proceed to 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).

125. The Court reiterates that Article 35 § 1 of the Convention provides for a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, capable of providing redress in respect of the

applicant's complaints and offered reasonable prospects of success (see *Selmouni v. France* [GC], no. 25803/94, § 76, ECHR 1999-V, and *Mifsud v. France* (dec.), no. 57220/00, § 15, ECHR 2002-VIII).

126. The Court further observes that an investigation into the kidnapping of Muslim Nenkayev and the third applicant had been pending since 15 August 2002. The applicants and the Government dispute the effectiveness of this investigation.

127. 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 these matters fall to be examined below under the substantive provisions of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

128. The applicants complained that Muslim Nenkayev had disappeared after having been detained by Russian servicemen and that the domestic authorities had failed to carry out an effective investigation into the matter. They relied on Article 2 of the Convention, which 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. Alleged violation of Muslim Nenkayev's right to life

1. Arguments of the parties

129. The applicants argued that it was beyond reasonable doubt that Muslim Nenkayev had been kidnapped by representatives of federal forces. They further stressed that their relative had been abducted in life-threatening circumstances and argued, relying on Article 2 of the Convention, that the fact that he had remained missing for more than six years proved that he was dead.

130. The Government referred to the fact that the investigation had obtained no evidence to the effect that Muslim Nenkayev was dead, or that representatives of the federal forces had been involved in his kidnapping or alleged killing.

2. The Court's assessment

(a) General principles

131. 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 *Orhan v. Turkey*, no. 25656/94, § 326, 18 June 2002). 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).

(b) Establishment of the facts

132. 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).

133. The applicants maintained that it was beyond reasonable doubt that the men who had taken Muslim Nenkayev and the third applicant away were State agents, since they were armed with machine guns with silencers used by the military, wore camouflage uniforms, spoke unaccented Russian and were able to move freely about Urus-Martan at night.

134. The Government submitted that on 8 June 2002 unidentified persons wearing camouflage uniforms and masks and armed with machine guns had taken Muslim Nenkayev and the third applicant to an unknown destination. The third applicant had later been released; Muslim Nenkayev's whereabouts had not been established.

135. The Government emphasised that the armed men had kidnapped only those members of the Nenkayev family who had been police officers, which proved that the perpetrators had been members of illegal armed groups. The tenth applicant had heard the perpetrators speaking Chechen, which proved that they were not necessarily ethnic Russians. The third applicant had claimed that he had been detained in the premises of the military commander's office only in his deposition addressed to the Court; he had never informed the domestic investigative authorities of it, apparently out of fear of being prosecuted for perjury. The officials of the local administrative authority and the FSB officer mentioned in the application form had been questioned and had denied the applicants' statement that they had ever confirmed the involvement of federal servicemen in the crime. Camouflage uniforms and machine guns could have been illegally purchased by insurgents; they could also have forged identity documents of the military or other State agencies to move freely through checkpoints.

136. The Court notes that despite its repeated requests for a copy of the entire investigation file concerning the kidnapping of Muslim Nenkayev and the third applicant, the Government have failed to produce it. They referred to Article 161 of the Code of Criminal Procedure. The Court observes that in previous cases it has already found this explanation insufficient to justify the withholding of key information requested by the Court (see *Imakayeva v. Russia*, no. 7615/02, § 123, ECHR 2006-...).

137. 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. It considers that the applicants have presented a coherent and convincing picture of the two Nenkayev brothers' arrest on 8 June 2002. The applicants stated that the perpetrators had acted in a manner similar to that of a security operation – they had checked the identity papers and searched the house. Moreover, the men had been armed with machine guns used by the Russian military. In their applications to the authorities the applicants consistently maintained that their relative had been detained by unknown servicemen and requested the investigation to look into that possibility.

138. The Court takes note of the Government's assertion that both Muslim Nenkayev and the third applicant were police officers at the material time and that they could have been kidnapped by insurgents wishing to take revenge on them but considers nonetheless that this is outweighed by the applicants' arguments for the following reasons.

139. The Court observes that the armed men who took away the Nenkayev brothers were travelling in a large group late at night in a town controlled by the federal military. As follows from the third applicant's statement, the armed men led him and his brother on foot for some fifty minutes before arrival at a two-storey building (see paragraph 22 above).

140. The third applicant assumed that the building belonged to the military commander's office. Owing to the Government's refusal to provide the investigation file in case no. 61116, the Court cannot compare the third applicant's depositions made before national authorities to those submitted to the Court. Yet it does not deem it necessary to establish whether the third applicant shared his conclusion as to the nature of the premises in which he had been kept with the investigators, since the building in question was most likely located inside Urus-Martan. Indeed, the Court doubts that some fifteen to thirty armed men escorting the two captured persons could have easily walked a long way out of Urus-Martan in fifty minutes and found a large building outside a settlement. Accordingly, it considers that the two Nenkayev brothers were walked through Urus-Martan and taken to premises located within the town.

141. The Court considers it rather dubious that in the course of their fifty-minute march through the town such a visible assembly could remain unnoticed by military patrols or any other law enforcement agencies or that insurgents could travel through federal checkpoints using forged documents of the military or other State agencies without being caught by servicemen on duty at those points. The Court thus finds that the fact that a large group of armed men in uniforms was able to move freely about the town controlled by the federal forces late at night and to abduct two men at their home strongly supports the applicants' allegation that these were State servicemen. It further notes that after over six years the domestic investigation had produced no tangible results.

142. 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 documents withheld by the Government, it is for the latter 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).

143. Taking into account the above elements, the Court is satisfied that the applicants have made a *prima facie* case that Muslim Nenkayev and the third applicant were arrested by State servicemen. 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. Drawing inferences from the Government's failure to submit the documents which were in their exclusive possession or to provide another plausible explanation for the events in question, the Court considers that Muslim Nenkayev and the third applicant were abducted on 8 June 2002 at their

house in Urus-Martan by State servicemen during an unacknowledged security operation.

144. The Court has to decide further whether Muslim Nenkayev is to be considered dead. It notes in this regard that there has been no reliable news of the missing man since 8 June 2002. His name has not been found in any official records of detention facilities. Lastly, the Government did not submit any explanation as to what happened to him after his abduction.

145. Having regard to the previous cases concerning disappearances of people in the Chechen Republic which have come before the Court (see, for example, *Imakayeva*, cited above, and *Luluyev and Others v. Russia*, no. 69480/01, ECHR 2006-...), 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 Muslim Nenkayev or any news of him for over six years corroborates this assumption. Furthermore, the Government have failed to provide any explanation of Muslim Nenkayev's disappearance and the official investigation into his abduction, dragging on for more than six years, has produced no tangible results.

146. Accordingly, the Court finds it established that on 8 June 2002 Muslim Nenkayev was abducted by State servicemen and that he must be presumed dead following his unacknowledged detention.

(c) The State's compliance with Article 2

147. Article 2, which safeguards the right to life and sets out the circumstances in which deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which no derogation is permitted. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivation of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances (see *McCann and Others v. the United Kingdom*, 27 September 1995, §§ 146-47, Series A no. 324, and *Avşar v. Turkey*, no. 25657/94, § 391, ECHR 2001-VII (extracts)).

148. The Court has already found it established that Muslim Nenkayev must be dead following his unacknowledged detention by State servicemen (see paragraph 146 above). Noting that the authorities do not rely on any ground of justification in respect of the use of lethal force by their agents, or otherwise accounting for his death, it follows that liability for his death is attributable to the respondent Government.

149. Accordingly, the Court finds that there has been a violation of Article 2 of the Convention in respect of Muslim Nenkayev.

B. The alleged inadequacy of the investigation into the abduction

1. Arguments of the parties

150. The applicants also claimed that the authorities had failed in their obligation to carry out an effective investigation into the circumstances of Muslim Nenkayev's disappearance. They argued that the investigation had fallen short of the requirements of domestic law and the Convention standards. In particular, it had been pending for more than six years without any tangible results so far, having been repeatedly suspended and resumed. The authorities had failed to promptly update the applicants on any progress made in the investigation.

151. The Government claimed that the investigation into the kidnapping of Muslim Nenkayev and the third applicant met the Convention requirement of effectiveness. The investigators had taken numerous steps to find Muslim Nenkayev, but in vain.

2. The Court's assessment

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

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

154. Turning to the facts of the case, the Court notes that, according to the applicants, they applied to the authorities for assistance in establishing the whereabouts of Muslim Nenkayev immediately after his abduction, that is on 8 June 2002. The Government did not contest this information. However, the investigation was opened on 15 August 2002, two months and seven days later. This important delay, for which no explanation was provided, was in itself liable to affect the investigation of a crime such as abduction in life-threatening circumstances, where crucial action must be taken promptly.

155. The Court further observes that the investigators failed to take such basic investigative measures as conducting witnesses' interviews in a timely fashion. For instance, the second and fourth applicants were questioned for the first time on 15 and 16 November 2003. The first applicant was not questioned until 1 August 2005. The State officials who had allegedly provided the applicants with important information on Muslim Nenkayev's abduction were questioned as late as 16 January 2006, three years and five months after the commencement of the investigation.

156. 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 steps. Most notably, there is no information that the crime scene was ever inspected. Moreover, nothing in the materials at the Court's disposal allows the conclusion that the investigators ever tried to question the GRU servicemen despite the applicants' repeated assertions of their possible implication in the crime. It also appears that the investigators had taken no measures to question the Urus-Martan FSB servicemen prior to 28 January 2008 when they instructed the ROVD to look into the possibility of their implication in the crime. It remains unknown whether those servicemen have ever been identified and questioned.

157. The Court also notes that even though the first applicant was eventually granted victim status, he was not informed of any significant developments in the investigation apart from several decisions on its suspension and resumption. Accordingly, the Court finds that the investigators failed to ensure that the investigation received the required level of public scrutiny, or to safeguard the interests of the next of kin in the proceedings (see *Ojür v. Turkey* [GC], no. 21594/93, § 92, ECHR 1999-III).

158. Finally, the Court notes that the investigation was suspended and resumed several times, so that there were lengthy periods of inactivity on the part of the investigators. Such handling of the investigation could not but have had a negative impact on the prospects of identifying the perpetrators and establishing the fate of Muslim Nenkayev.

159. Having regard to the limb of the Government's preliminary objection that was joined to the merits of the complaint, inasmuch as it concerns the fact that the domestic investigation is still pending, the Court notes that the investigation, having been repeatedly suspended and resumed and plagued by inexplicable delays, has been ongoing for over six years and has produced no tangible results. Accordingly, the Court finds that the remedy relied on by the Government was ineffective in the circumstances and dismisses their preliminary objection in this part.

160. The Government also mentioned the possibility for the applicants to apply for judicial review of the decisions of the investigating authorities in the context of exhaustion of domestic remedies. The Court observes that the first applicant indeed tried to make use of this remedy suggested by the Government. Leaving aside the question of whether the town court's failure to examine his complaint on the merits in nearly six years was due to lack of a proper signature, it considers that in any event neither the first applicant nor the other applicants, having no access to the case file and not being properly informed of the progress of the investigation, could have effectively challenged actions or omissions of investigating authorities before a court. Furthermore, the investigation has been resumed by the prosecuting authorities themselves a number of times due to the need to take additional investigative measures. 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. Therefore, the Court finds that the remedy relied on by the Government was ineffective in the circumstances and rejects their preliminary objection in this part also.

161. 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 disappearance of Muslim Nenkayev, in breach of Article 2 of the Convention in its procedural aspect.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

162. The applicants complained that Muslim Nenkayev had been subjected to treatment in violation of Article 3 of the Convention and that the authorities had failed to investigate the ill-treatment. They further complained that the anguish and distress suffered by them as a result of their relative's disappearance and the authorities' reaction amounted to treatment in violation of Article 3 of the Convention, which reads as follows:

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

163. The Government submitted that the investigation had been conducted in compliance with Article 3 of the Convention and had produced no evidence that either the applicants or Muslim Nenkayev had been subjected to treatment prohibited by the above Convention provision.

A. Alleged ill-treatment of Muslim Nenkayev

164. In so far as the applicants complained about alleged ill-treatment of Muslim Nenkayev following his abduction, the Court reiterates that allegations of ill-treatment must be supported by appropriate evidence. To assess this evidence, the Court adopts the standard of proof “beyond reasonable doubt” but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact (see *Ireland v. the United Kingdom*, cited above, § 161 *in fine*).

165. The Court has found it established that Muslim Nenkayev was detained on 8 June 2002 by State agents. It has also found that, in view of all the known circumstances, he should be considered dead and that the responsibility for his death lies with the State authorities (see paragraph 146 above). The Court notes, however, that the exact way in which Muslim Nenkayev died and whether he was subjected to ill-treatment while in detention have not been established, and finds that this complaint has not been substantiated.

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

B. The applicants’ mental suffering

167. Turning to the applicants’ complaint concerning the distress they had endured after Muslim Nenkayev’s disappearance, 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 v. Turkey*, no. 25656/94, § 358, 18 June 2002, and *Imakayeva*, cited above, § 164).

168. In the present case the Court notes that the first and second applicants are the parents of the missing person, the third to ninth applicants are his siblings and the tenth applicant is his sister-in-law. The materials in its possession show that the first applicant made the vast majority of petitions and enquiries to the domestic authorities in connection with Muslim Nenkayev's disappearance, while on some occasions it was the second applicant who dealt with the investigators. The Court also points out that the third applicant was arrested together with his brother and then detained for twenty-four hours and that the domestic investigation concerned the kidnapping of the two Nenkayevs. It follows that the third applicant was directly involved in communication with the authorities. However, no evidence has been submitted to the Court that the other seven applicants participated in the search for Muslim Nenkayev (see, by contrast, *Luluyev and Others*, cited above, § 112). In such circumstances, the Court, while accepting that the events of 8 June 2002 might have been a source of considerable distress to the fourth to tenth applicants, is nevertheless unable to conclude that their mental suffering was distinct from the inevitable emotional distress in a situation such as in the present case and that it was so serious that it fell within the ambit of Article 3 of the Convention.

169. As regards the first, second and third applicants, the Court notes that for more than six years they have not had any news of Muslim Nenkayev. During this period the first applicant has applied to various official bodies with enquiries about his son, both in writing and in person. Despite all the efforts, the applicants have never received any plausible explanation or information as to what became of their family member following his arrest. The responses received by the applicants mostly denied the State was responsibility or simply informed them that an investigation was ongoing. The Court's findings under the procedural aspect of Article 2 are also of direct relevance here.

170. In view of the above, the Court finds that the first, second and third applicants suffered, and continue to suffer, distress and anguish as a result of the disappearance of their family member and their inability to find out what happened to him. The manner in which their complaints have been dealt with by the authorities must be considered to constitute inhuman treatment contrary to Article 3.

171. The Court therefore concludes that there has been a violation of Article 3 of the Convention in respect of the first, second and third applicants, and no violation of this provision in respect of the other applicants.

IV. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

172. The applicants further stated that Muslim Nenkayev and the third applicant 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.”

173. In the Government’s opinion, no evidence was obtained by the investigators to confirm that Muslim Nenkayev and the third applicant had been arrested by State agents.

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

175. The Court has found it established that Muslim Nenkayev and the third applicant were arrested by State servicemen on 8 June 2002 (see paragraph 143 above). Their arrest and detention were not acknowledged and were not logged in any custody records. Moreover, there exists no official trace of Muslim Nenkayev’s subsequent whereabouts or fate.

176. The Court reiterates that the absence of documented evidence to the arrest and detention 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).

177. Turning to the Government's preliminary objection concerning non-exhaustion of domestic remedies by the third applicant, which has been joined to the merits of the complaint, the Court first observes that the third applicant duly and promptly informed the authorities of his abduction by a group of armed men most likely belonging to State agencies. The investigation into his kidnapping in case no. 61116 was instituted on 15 August 2002 and has not been completed to date. In such circumstances the Court cannot conclude that the third applicant has not raised a complaint concerning his unlawful detention at national level. Secondly, the Government did not specify what type of claim or complaint would have been an effective remedy and before which authority it should have been lodged in their view. Neither did they provide any further information as to how this could have provided the third applicant with adequate redress. The Court thus finds that the Government have not substantiated their claim that the remedies that the third applicant had allegedly failed to exhaust in relation to his complaints concerning his unacknowledged detention were effective (see, among other authorities, *Kranz v. Poland*, no. 6214/02, § 23, 17 February 2004, and *Skawinska v. Poland* (dec.), no. 42096/98, 4 March 2003). The Government's preliminary objection in this respect is therefore dismissed.

178. Consequently, the Court finds that Muslim Nenkayev and the third applicant were 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

179. The applicants stated that they had been deprived of access to a court, contrary to the provisions of Article 6 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..."

180. The applicants maintained their complaint.

181. The Government disputed this allegation.

182. The Court finds that the applicants' complaint under Article 6 concerns essentially the same issues as those discussed above under the procedural aspect of Article 2 and to be examined below under Article 13. It should also be noted that the applicants submitted no information to prove their attempts to apply to a domestic court to claim compensation. In these circumstances, the Court finds that no separate issues arise under Article 6 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

183. The applicants complained under Article 8 of the Convention that Russian servicemen had unlawfully entered their house and searched it. Article 8 of the Convention reads as follows:

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

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

184. The Government submitted that the applicants had not complained about the search to the investigators before 3 March 2006. They referred in this respect to the second and fourth applicants' interviews of 15 and 16 November 2003.

185. The applicants contested the Government's argument and submitted that they had informed the district prosecutor's office that some household items had been stolen from them. They referred to the interviews with the Nenkayev family members of 16 January 2006.

186. The Court does not deem it necessary to examine the Government's preliminary objection joined to the merits concerning non-exhaustion of domestic remedies in relation to this complaint for the following reason.

187. The Court first notes that the parties have not disputed that the applicants did not complain to the investigators of the fact of the search of their house on 8 June 2002 before 16 January 2006. It therefore considers it established that the applicants brought their grievances in this respect to the attention of the authorities three years and seven months after the events in question.

188. The Court further reiterates that Article 35 § 1 of the Convention requires that the Court may only deal with a matter where it has been introduced within six months from the date of the final decision. Where it is clear from the outset however that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained

of, or from the date of knowledge of that act or its effect on, or prejudice to, the applicant (see *Dennis and Others v. the United Kingdom* (dec.), no. 76573/01, 2 July 2002). It also emphasises that it is not open to the Court to set aside the application of the six-month rule solely because a Government have not made a preliminary objection based on it (see *Walker v. the United Kingdom* (dec.), no. 34979/97, *Reports* 2000-I).

189. The Court has no reasons to believe that prior to January 2006 the applicants were in any manner precluded from lodging a complaint concerning the allegedly unlawful search of their home given that the complaints about the abduction of Muslim Nenkayev and the third applicant were submitted to the authorities in the morning that followed the crime. The applicants produced no explanation to their failure to promptly file a complaint about the search at national level.

190. In such circumstances the Court considers that the applicants must have regarded domestic remedies available to them concerning the search of their house, such as a complaint to an investigative authority, as ineffective from the very beginning of their attempts to have the abduction of Muslim Nenkayev and the third applicant investigated. Moreover, on 15 August 2002 the district prosecutor's office notified the first applicant that the investigation in case no. 61116 concerned only the kidnapping of his sons, not the intrusion into his home. However, none of the applicants requested to expand the scope of the investigation to cover this issue during the following three years and five months.

191. Assuming therefore that the domestic investigation did not constitute an effective remedy as regards the unlawful intrusion in the applicants' home, the Court concludes that the applicants should have lodged their complaint under Article 8 of the Convention within six months from the date of the alleged violation of their rights, which they failed to do.

192. It follows that the applicants' complaint concerning the unlawful search of their home was lodged out of time, and the Court is therefore unable to take cognisance of its merits.

VII. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

193. The applicants complained that they had been deprived of effective remedies in respect of the alleged violations of Articles 2, 3, 5 and 8, 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.”

194. The applicants contended that they had had recourse to the only potentially effective remedy, the criminal investigation. However, in their

case it had proved to be ineffective, and the flaws of the investigation undermined the effectiveness of other remedies that might have existed.

195. The Government contended that the applicants had had effective domestic remedies, as required by Article 13 of the Convention, and that the Russian authorities had not prevented them from using those remedies. The investigation into their relative's disappearance was still pending. At the same time the applicants had not applied to the domestic courts with either civil claims or complaints concerning actions of the agents of the law-enforcement bodies. The Government referred to the domestic courts' decisions over claims for pecuniary and non-pecuniary damage caused by offences committed by Russian servicemen in the North Caucasus Region.

196. 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. 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, §§ 161-62, ECHR 2002-IV, and *Süheyly 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 v. Russia*, nos. 57942/00 and 57945/00, § 183, 24 February 2005).

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

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

199. As to the applicants' complaint under Article 13 about the lack of domestic remedies in respect of their complaint under Article 3 that Muslim Nenkayev had been ill-treated while in detention at the hands of the authorities, the Court notes that this latter complaint has been found to be unsubstantiated. In the absence of an "arguable claim" of a violation of a substantive Convention provision the Court finds that there has been no violation of Article 13 in this respect.

200. As regards the applicants' reference to Article 13 in conjunction with Article 3 of the Convention, in so far as their mental suffering was concerned, the Court notes that it has found above that the first, second and

third applicants endured severe mental suffering on account of, *inter alia*, the authorities' inadequate investigation into their relative's disappearance. It has also found a violation of Article 13 of the Convention in connection with Article 2 of the Convention on account of the lack of effective remedies available to the applicants as a result of the inadequacy of the investigation. Having regard to these findings, the Court is of the opinion that the applicants' complaint under Article 13 in conjunction with Article 3 is subsumed by those under Article 13 in conjunction with Article 2 of the Convention. It therefore does not consider it necessary to examine the complaint under Article 13 in connection with Article 3 of the Convention.

201. As regards the applicants' reference to Article 5 of the Convention, the Court notes that according to its established case-law the more specific guarantees of Article 5 §§ 4 and 5, being a *lex specialis* in relation to Article 13, absorb its requirements and in view of its above findings of a violation of Article 5 of the Convention by unacknowledged detention, the Court considers that no separate issue arises in respect of Article 13 read in conjunction with Article 5 of the Convention in the circumstances of the present case.

202. Lastly, as regards the applicants' reference to Article 13 taken in conjunction with Article 8 of the Convention, the Court notes that it has been unable to look into the merits of the complaint concerning the search of the applicants' home for non-compliance with the six months' rule and that the applicants therefore had not made an "arguable claim" under Article 8 of the Convention. Hence, there has been no violation of Article 13 in conjunction with this provision.

VIII. OBSERVANCE OF ARTICLE 38 § 1 (a) OF THE CONVENTION

203. The applicants argued that the Government's failure to submit the documents requested by the Court at the communication stage disclosed a failure to comply with their obligations under Article 38 § 1 (a) of the Convention, which provides, in so far as relevant:

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

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

..."

204. The applicants invited the Court to conclude that the Government's refusal to submit a copy of the entire investigation file in response to the Court's requests was incompatible with their obligations under Article 38 of the Convention.

205. The Government reiterated that the submission of the case file would be contrary to Article 161 of the Code of Criminal Procedure.

206. The Court reiterates that proceedings in certain types of applications do not in all cases lend themselves to a rigorous application of the principle whereby a person who alleges something must prove that allegation and that it is of the utmost importance for the effective operation of the system of individual petition instituted under Article 34 of the Convention that States should furnish all necessary facilities to make possible a proper and effective examination of applications.

207. This obligation requires the Contracting States to furnish all necessary facilities to the Court, whether it is conducting a fact-finding investigation or performing its general duties as regards the examination of applications. It is inherent in the proceedings relating to cases of this nature, where individual applicants accuse State agents of violating their rights under the Convention, that in certain instances it is only the respondent State that has access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information which is in their possession without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention. In a case where the application raises issues as to the effectiveness of the investigation, the documents of the criminal investigation are fundamental to the establishment of the facts and their absence may prejudice the Court's proper examination of the complaint both at the admissibility and at the merits stage (see *Tanrikulu v. Turkey* [GC], no. 23763/94, § 71, ECHR 1999-IV).

208. The Court notes that despite its repeated requests for a copy of the investigation file opened into the disappearance of the applicants' relative, the Government refused to produce such a copy, relying on Article 161 of the Code of Criminal Procedure, having provided only copies of decisions to suspend and resume the investigation and to grant victim status, and of the transcripts of the interviews with the first and fifth applicants. The Court observes that in previous cases it has already found this reference insufficient to justify refusal (see, among other authorities, *Imakayeva*, cited above, § 123).

209. Referring to the importance of a respondent Government's cooperation in Convention proceedings, and mindful of the difficulties associated with the establishment of facts in cases of such a nature, the Court finds that the Government fell short of their obligations under Article 38 § 1 of the Convention because of their failure to submit copies of the documents requested in respect of the disappearance of Muslim Nenkayev.

IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

210. 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

211. The applicants did not claim any pecuniary damages. They claimed in respect of non-pecuniary damage for the suffering they had endured as a result of the loss of their family member, the indifference shown by the authorities towards them and the failure to provide any information about the fate of their close relative. The first and second applicants claimed 80,000 euros (EUR) each, the third applicant claimed EUR 40,000, the fourth to ninth applicants claimed EUR 30,000 each and the tenth applicant claimed EUR 10,000.

212. The Government found the amounts claimed exaggerated.

213. The Court has found violations of Articles 2, 5 and 13 of the Convention on account of the unacknowledged detention and disappearance of Muslim Nenkayev, as well as lack of effective remedies as regards the violation of his right to life. The third applicant has been found to have been a victim of violations of Articles 3 and 5, while the first and second applicants have been found to have been victims of a violation of Article 3 of the Convention. Taking into consideration the applicants' family ties with Muslim Nenkayev, the Court accepts that they have suffered non-pecuniary damage which cannot be compensated for solely by the findings of violations. It finds it appropriate to award EUR 20,000 to the first and second applicants jointly, EUR 10,000 to the third applicant and EUR 750 to the fourth, fifth, sixth, seventh, eighth, ninth and tenth applicants each, plus any tax that may be chargeable thereon.

B. Costs and expenses

214. The applicants were represented by the SRJI. They submitted an itemised schedule of costs and expenses that included research and interviews, 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, as well as administrative expenses, translation and courier mail fees. The aggregate claim in respect of costs and expenses related to the applicants' legal representation amounted to EUR 8,164.19.

215. The Government disputed the reasonableness and the justification of the amounts claimed under this head. They also submitted that the applicants' claims for just satisfaction had been signed by five lawyers, whereas two of them had not been mentioned in the powers of attorney issued by the applicants. They also doubted that it had been necessary to send the correspondence to the Registry via courier mail.

216. The Court points out that the applicants had given authority to act to the SRJI and its three lawyers. The applicants' claims for just satisfaction were signed by five persons in total. The names of three of them appeared in the powers of attorney, while two other lawyers worked with the SRJI. In such circumstances the Court sees no reason to doubt that the five lawyers mentioned in the applicants' claims for costs and expenses took part in the preparation of the applicants' observations on the merits of the case. Moreover, there are no grounds to conclude that the applicants were not entitled to send their submissions to the Court via courier mail.

217. 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).

218. 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.

219. Further, it has to be established whether the costs and expenses incurred for legal representation were necessary. The Court notes that this case was rather complex and required a certain amount of research and preparation. It notes, however, that the case involved little documentary evidence, in view of the Government's refusal to submit the case file. The Court thus doubts that research was necessary to the extent claimed by the applicants' representatives.

220. Having regard to the details of the claims submitted by the applicants and acting on an equitable basis, the Court awards them the amount of EUR 7,500, less EUR 850 received by way of legal aid from the Council of Europe, plus any tax that may be chargeable to the applicants, the award to be paid into the representatives' bank account in the Netherlands, as identified by the applicants.

C. Default interest

221. 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. *Holds* that it is unable to consider the merits of the applicants' complaint under Article 8 of the Convention as it has been lodged out of time;
2. *Dismisses* the Government's preliminary objection as to non-exhaustion of domestic remedies;
3. *Holds* that there has been a violation of Article 2 of the Convention in respect of Muslim Nenkayev;
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 circumstances in which Muslim Nenkayev had disappeared;
5. *Holds* that there has been no violation of Article 3 of the Convention as regards the alleged ill-treatment of Muslim Nenkayev;
6. *Holds* that there has been a violation of Article 3 of the Convention in respect of the first, second and third applicants on account of their mental suffering;
7. *Holds* that there has been no violation of Article 3 of the Convention in respect of the fourth, fifth, sixth, seventh, eighth, ninth and tenth applicants;
8. *Holds* that there has been a violation of Article 5 of the Convention in respect of Muslim Nenkayev and the third applicant;
9. *Holds* that there has been a violation of Article 13 of the Convention in conjunction with Article 2 of the Convention;
10. *Holds* that there has been no violation of Article 13 of the Convention as regards the alleged violation of Article 3 of the Convention in respect of Muslim Nenkayev and the alleged violation of Article 8 of the Convention;
11. *Holds* that no separate issues arise under Article 13 of the Convention in respect of the alleged violation of Article 3 in respect of the first, second and third applicants on account of mental suffering and in respect of the alleged violation of Article 5 of the Convention;

12. *Holds* that there has been a failure to comply with Article 38 § 1 (a) of the Convention in that the Government have refused to submit documents requested by the Court;
13. *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 20,000 (twenty thousand euros) to the first and second applicants jointly, EUR 10,000 (ten thousand euros) to the third applicant and EUR 750 (seven hundred and fifty euros) to the fourth, fifth, sixth, seventh, eighth, ninth and tenth applicants each in respect of non-pecuniary damage, plus any tax that may be chargeable, to be converted into Russian roubles at the rate applicable at the date of settlement;
 - (ii) EUR 6,650 (six thousand six hundred and fifty euros), 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;
14. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 28 May 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President