



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

FIRST SECTION

CASE OF KHATUYEVA v. RUSSIA

(Application no. 12463/05)

JUDGMENT

STRASBOURG

22 April 2010

FINAL

04/10/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Khatuyeva v. Russia,

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

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Elisabeth Steiner,

Khanlar Hajiyeu,

Dean Spielmann,

Sverre Erik Jebens, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 25 March 2010,

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

PROCEDURE

1. The case originated in an application (no. 12463/05) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Ms Luiza Khatuyeva (“the applicant”), on 28 March 2005.

2. The applicant was represented by lawyers of the NGO EHRAC/Memorial Human Rights Centre. The Russian Government (“the Government”) were represented by Mrs V. Milinchuk, the former Representative of the Russian Federation at the European Court of Human Rights and subsequently by their new representative, Mr G. Matyushkin.

3. On 15 January 2008 the Court decided to apply Rule 41 of the Rules of Court and to grant priority treatment to the application and to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1969. A native of Chechnya, from 1996 she lived in the settlement for internally displaced persons from Chechnya in the village of Ordzhonikidzevskaya (also known as Sleptsovskaya), in the Ingush Republic of the Russian Federation (Ingushetia). The applicant later left Russia with her children and sought asylum in another country, where she now resides. She is the wife of Sultan Khatuyev, who allegedly disappeared in 2004 following his arrest by the security forces.

A. Disappearance of Sultan Khatuyev

6. On 2 August 2004 at about 8.00 a.m. an operation was carried out in the Ordzhonikidzevskaya settlement by the security forces with a view to finding members of illegal armed groups. More than one hundred servicemen and numerous vehicles were involved in the operation.

7. The applicant stated that her home had been searched during this operation by two servicemen who neither introduced themselves nor produced any document. They checked Sultan Khatuyev's passport and ordered him to follow them to their car. In response to the applicant's questions, the servicemen told her that her husband would be taken along with some of their neighbours to the Sunzhensky district department of the Interior (ROVD) for an identity check. Six other persons were apprehended and taken to the Sunzhensky ROVD during the same operation. They were all neighbours and knew each other.

8. As soon as the operation was over the applicant went by car to the Sunzhensky ROVD together with R.A., a relative of another apprehended person. They saw the seven apprehended men being taken from the yard into the ROVD building.

9. Three of these men were released at approximately midnight. Two of them later stated that they had initially been detained for several hours in a wing on the ground floor and then taken to the second floor for questioning.

10. On 3 August 2004 at approximately 1 a.m. a ROVD officer informed the applicant and the three men who had just been released that the other detainees, including Sultan Khatuyev, would be released in the morning.

11. Around 8.00 a.m. on 3 August the applicant went back to the ROVD with relatives of the other detainees. They were told that the four remaining detainees had been taken to the Federal Security Service (FSB) office in Magas. The applicant and the other detainees' relatives immediately went there. While they were not allowed to enter the premises, an officer

confirmed that the four people, including Sultan Khatuyev, were being detained at that office.

12. In response to the applicant's repeated requests an officer came out of the building at 4.00 p.m. and released two more persons. He also told the applicant that the other two persons, Sultan Khatuyev and U.I., had already been released. According to U.I.'s relatives, he had indeed been released in an extremely poor condition by FSB officers between 1.00 and 2.00 p.m. and left alone at a rubbish dump. The applicant went to the rubbish dump to look for her husband but did not find him or any of his personal belongings.

13. U.I. later told the applicant that he and Sultan Khatuyev had been detained in two neighbouring cells on the FSB premises and that he had heard Sultan Khatuyev groaning. He told her that he had been beaten by the FSB officers and that, given the sounds coming from the other cell, Sultan Khatuyev had been beaten as well. The lawyer representing the applicant submitted a written statement about his conversation with U.I. to that effect; however, he noted in the same statement that U.I. had feared reprisals and refused to sign any testimonies about his detention. According to the lawyer's submissions, U.I. and Sultan Khatuyev had been taken in the same car from the Sunzhenskiy ROVD to the FSB office in Magas. U.I. had had a plastic bag over his head but he had heard the voice of the applicant's husband, whom he had known well as they had been neighbours. He also told the lawyer that the car had not stopped anywhere on the way to Magas and that at one point he had heard Sultan Khatuyev screaming in the building.

14. The applicant has had no news of Sultan Khatuyev since 2 August 2004.

15. In support of her own statements, the applicant submitted statements by her relatives and a statement by one of the persons who had been detained on 2 August 2004 at the Sunzhenskiy ROVD together with Sultan Khatuyev.

16. The Government did not dispute the circumstances of the applicant's husband's detention on 2 August 2004.

B. The search for Sultan Khatuyev and the investigation

1. The applicant's account

17. Since 3 August 2004 the applicant has repeatedly applied in person and in writing to various public bodies. She has been supported in her efforts by NGO Memorial. In her letters to the authorities the applicant referred to her husband's detention and asked for assistance and details of the investigation. Mostly these enquiries have remained unanswered, or purely formal replies have been given in which the applicant's requests have been forwarded to various prosecutors' offices. The applicant submitted

some of the letters to the authorities and the replies to the Court, which are summarised below.

18. On 3 August 2004 the applicant lodged a written complaint with the Sunzhensky ROVD about the abduction of her husband. She was informed by the ROVD officers that they were not aware of his fate after he had been taken to the FSB office in Magas.

19. On 4 August 2004 the applicant again went with her relatives to the ROVD office to inquire about her husband and talked to officer A.B., whom she had seen take part in the operation at issue. He gave them no information, but insulted the applicant and her sister-in-law using obscene language. The incident was interrupted by another officer, A.G., who had also taken part in the operation. The latter informed the applicant, after a telephone call to the FSB office in Magas, that Sultan Khatuyev was still being detained there. A.G. promised to find out the reasons for his detention, but failed to provide any further information in response to the applicant's subsequent telephone calls.

20. On 6 August and 9 August 2004 the applicant complained to the Sunzhensky District Prosecutor's Office (hereafter "the district prosecutor's office") about the abduction of her husband and demanding an investigation into the matter.

21. By a letter of 9 August 2004 the FSB office of Ingushetia informed the applicant that they had no information about Sultan Khatuyev's apprehension and whereabouts.

22. On 12 August 2004 the applicant requested the Minister of the Interior of Ingushetia to identify the servicemen involved in the abduction of her husband.

23. On 19 August 2004 the applicant wrote to the district prosecutor's office and submitted additional details of her husband's disappearance.

24. On 20 August 2004 the District Prosecutor's Office opened a criminal investigation (case file no. 04600054) into Sultan Khatuyev's kidnapping under Article 126, part 1, of the Criminal Code. The applicant was informed thereof by letters of 31 August and 8 September 2004.

25. In September 2004 the applicant received a reply from the acting Minister of the Interior of Ingushetia. The letter stated that on 2 August 2004 eight persons, including Sultan Khatuyev, had been apprehended during an operation carried out jointly by the FSB Department for Ingushetia and the special forces of the Ingush Ministry of the Interior (OMON) with a view to identifying and arresting persons involved in illegal armed groups. The Minister also confirmed that four of those persons had been released, while four others, including Sultan Khatuyev, had been relocated pursuant to the orders of the head of the FSB group Mr M.Ye. The Minister indicated that the investigation to find out Sultan Khatuyev's whereabouts was under way.

26. On various dates in October 2004 the applicant again wrote to the district prosecutor's office. She inquired about the progress of the criminal proceedings, requested to be granted victim status and access to the case file and to question the six witnesses who had been apprehended together with her husband. The prosecutor's office replied on 1 November 2004 and confirmed that four persons including Sultan Khatuyev had been taken to the ROVD and subsequently transferred to the FSB office in Magas and that Sultan Khatuyev's whereabouts were still not known.

27. On 4 November 2004 the applicant asked the district prosecutor to bring criminal charges against the persons involved in the abduction of her husband. She again requested access to the criminal case file. She also asked specifically for the other men who had been apprehended on the same day and the officials involved, including the ROVD officers who had arrested her husband and the FSB officer M.Ye., who had ordered his transfer to the Magas FSB Department, to be questioned.

28. The applicant received no response to these requests. In reply to her subsequent requests the prosecutor's office indicated, by letter of 19 February 2005, that the investigation concerning criminal file no. 04600054 was still ongoing.

29. On 20 February 2005 the investigation was discontinued given the failure to identify the persons against whom the charges were to be brought (Article 208, part 1, paragraph 1 of the Code of Criminal Procedure) and the applicant was informed thereof by letter of 5 March 2005.

30. On 5 May 2005 the applicant lodged a complaint with the Sunzhensky District Court ("the district court") under Article 125 of the Code of Criminal Procedure. She requested the court to declare the inaction of the prosecutor's office unlawful, to quash the prosecutor's decision adjourning the investigation and to order a thorough and effective investigation into Sultan Khatuyev's abduction.

31. On 24 May 2005 the district court dismissed the applicant's complaint. The court noted in particular that the investigation authorities had questioned certain officers of the Sunzhensky ROVD, including A.G., and complied with the plan of investigation measures. The court also noted that the necessary measures had been taken to secure the questioning of FSB officer M.Ye., but the latter had failed to appear due to circumstances beyond the investigator's control.

32. On 4 June 2005 the Supreme Court of Ingushetia reviewed the applicant's cassation appeal against this decision. The court quashed and remitted the decision of 24 May 2005, with an instruction to the investigation authorities to question Mr M.Ye.

33. The applicant received no further information about the proceedings in the case concerning her husband's abduction. In 2008 she informed the Court that she had been threatened by unnamed representatives of the security forces, who had allegedly told her to stop complaining. They

threatened to plant drugs or arms on her teenaged sons or accuse them of being involved with illegal armed groups. The applicant and her family left Russia and sought asylum in another country.

34. The applicant submitted that her health had deteriorated significantly since the events of 2 August 2004 and the disappearance of Sultan Khatuyev. Without presenting any documents, she claimed that in 2008 she had been diagnosed with a benign tumour, which she thought was a result of the endured stress.

2. Information submitted by the Government

35. With reference to the information provided by the Prosecutor General's Office, the Government submitted that the investigation of the abduction of Sultan Khatuyev had commenced on 20 August 2004.

36. On unspecified dates the investigation questioned the applicant and Sultan Khatuyev's parents. The applicant was granted victim status on 25 August 2004.

37. The Government stated that two servicemen of the Sunzhenskiy ROVD had been questioned in the course of the investigation. They testified that on 2 August 2004 their office had assisted the FSB and the criminal police of Ingushetia in the security operation in Ordzhonikidzevskaya. One serviceman had taken part in this operation, while the other one had not. The aim of the operation had been to identify members of illegal armed groups and to check that the inhabitants of the settlement of internal migrants from Chechnya were complying with residence rules. The participating serviceman had been aware of the detention of four men, the identities and the reasons for detention of whom he had not known. The other serviceman (presumably, this was A.G., questioned on 3 September 2004 – see paragraph 31 above) had learnt of Sultan Khatuyev's detention from the latter's relatives. The witnesses had no other information about Sultan Khatuyev.

38. It also appears from Government's observations that on an unspecified date the investigators questioned U.I., who refused to submit any complaints about the alleged ill-treatment. As it appears, no other witnesses were identified or questioned.

39. The Government further cited the report of the border security regiment of the Ministry of the Interior of Ingushetia of 8 November 2004. According to them, 60 servicemen of the regiment had participated in the joint operation on 2 August 2004 aimed at identifying the persons who had taken part in a terrorist attack on 22 June 2004. Several persons had been delivered to the Sunzhenskiy ROVD.

40. The Government also referred to a report from the Ingushetia Department of the FSB of 15 September 2004, according to which Sultan Khatuyev had been questioned in the service car in order to establish his identity. The FSB officers thus found out that in fact they had been looking

for a relative of his, A.B. Khatuyev. In view of this Sultan Khatuyev had been released from the car at the gas station situated at the exit from Ordzhonikidzevskaya, before the road police block “Volga-20”. Sultan Khatuyev had rejected the servicemen's offer of a lift home.

41. The Government submitted that in November 2004 the investigating authorities had sent a number of queries to various State bodies. On an unspecified date the Ingushetia department of the FSB stated that their office had not detained Sultan Khatuyev and had no information about his whereabouts. The Ministry of the Interior of Chechnya also replied, on 7 September 2004, that their agents had not detained Sultan. Also on unspecified dates the remand centres in the Northern Caucasus informed the investigation that the missing man had never been detained there.

42. As far as the applicant's attempts to obtain judicial review of the prosecutor's decisions are concerned, the Government added that on 28 July 2005 the district court had granted the applicant's action against the prosecutor's office and had obliged the latter to carry out a complete and effective investigation into the circumstances of her husband's abduction.

43. The investigation failed to establish the whereabouts of Sultan Khatuyev. The law enforcement authorities of Chechnya had never arrested or detained Sultan Khatuyev on criminal or administrative charges and had not carried out a criminal investigation in his respect. The Government insisted that the incident should be qualified not as detention, but as “apprehension with the aim of identifying personal identity” (“задержан для уточнения личности») and that as soon as his identity had been established, he had been released.

44. According to the information submitted by the Government, between 20 August 2004 and 4 February 2008 the investigation was suspended and resumed on several occasions, and has so far failed to identify those guilty. The latest decision to resume the investigation was dated 4 February 2008.

45. Despite specific requests by the Court the Government did not disclose any of the documents of criminal case no. 04600054. Relying on the information obtained from the Prosecutor General's Office, the Government stated that the investigation was in progress and that disclosure of the documents would be in violation of Article 161 of the Code of Criminal Procedure, since the file contained information of a military nature and personal data concerning the witnesses or other participants in the criminal proceedings.

II RELEVANT DOMESTIC LAW

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

THE LAW

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

47. The Government contended that the complaint should be declared inadmissible for non-exhaustion of domestic remedies. They submitted that the investigation into the disappearance of Sultan Khatuyev had not yet been completed. They also noted that the applicant had applied to the Court before the domestic authorities had had a chance to review her complaints.

48. The applicant contested that objection. She stated that the criminal investigation had proved to be ineffective from an early stage and that her complaints to that effect, including the application to the district court, had been futile. The directions issued by the domestic courts had not been complied with.

49. The Court considers that the Government's objection raises issues concerning the effectiveness of the investigation which are closely linked to the merits of the applicant's complaints. Thus, it decides to join this objection to the merits of the case and considers that the issue falls to be examined below.

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

A. The parties' arguments

50. The applicant maintained that it was beyond reasonable doubt that Sultan Khatuyev had been detained on 2 August 2004 by State agents and delivered to the office of the Ingushetia department of the FSB in Magas. He was last seen alive in the hands of the State agents and the Government had failed to discharge its burden of proof by submitting any explanation as to what had happened to him afterwards. The applicant also asked the Court to draw inferences from the Government's failure to present any documents from the investigation file, either to them or to the Court. Since her husband had been missing for a very lengthy period, he could be presumed dead. That presumption was further supported by the circumstances in which he had been arrested, which should be recognised as life-threatening.

51. The Government submitted that Sultan Khatuyev had not been detained, but only briefly apprehended in the car and then released as soon as it had been established that the FSB had been looking for another man with the same family name. They further contended that the investigation of

the incident was in progress, and that there was no evidence that the applicant's husband was dead. The Government also raised a number of objections to the applicant's presentation of the facts. They alleged that her recollections of the conversations she had had with officials after the detention of her husband had been inconsistent. They also alleged that the testimonies given by A.G. and U.I. in the course of the investigation contradicted the applicant's presentation of their statements. The Government did not submit the witness statements in question to the Court.

B. The Court's evaluation of the facts

52. The Court observes that in its extensive jurisprudence it has developed a number of general principles relating to the establishment of the 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, §§ 103-109, 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).

53. The Court notes that despite its requests for a copy of the investigation file into the abduction of Sultan Khatuyev, the Government produced no documents from the case file. The Government referred to Article 161 of the Code of Criminal Procedure. The Court observes that in previous cases it has already found this explanation insufficient to justify the withholding of key information requested by the Court (see *Imakayeva v. Russia*, no. 7615/02, § 123, ECHR 2006- XIII (extracts)).

54. In view of this and bearing in mind the principles referred to above, the Court finds that it can draw inferences from the Government's conduct in respect of the well-foundedness of the applicant's allegations. The Court will thus proceed to examine crucial elements in the present case that should be taken into account when deciding whether the applicant's husband can be presumed dead and whether his death can be attributed to the authorities.

55. It clearly follows from the evidence submitted by the parties and uncontested by them that on 2 August 2004 Sultan Khatuyev was detained in Ordzhonikidzevskaya during a security operation and delivered to the ROVD, from which he was taken away in the direction of the Ingushetia department of the FSB. The documents cited by the Government refer to finding persons suspected of involvement in illegal armed groups and responsible for a terrorist act as the aims of the operation, though no formal charges have been ever brought. It does not appear that any records were drawn up in relation to the detention or any other actions carried out in respect of Sultan Khatuyev. He has not been seen since that day and his family has had no news of him. The investigation failed to establish what

had happened to him or to charge anyone in connection with the disappearance.

56. The Government suggested that certain documents in the criminal investigation file proved that Mr Khatuyev had been released. However, since none of these documents have been submitted to the Court, it is reluctant to rely on them in order to absolve the Government from their responsibility to account for the fate of detainees last seen alive within their hands (see *Akkum and Others v. Turkey*, no. 21894/93, § 211, ECHR 2005-II (extracts)).

57. The Government also questioned the credibility of the applicant's statements in view of certain discrepancies relating to the description of the days immediately following the detention. The Court notes in this respect that no other elements underlying the applicant's submissions of the facts have been disputed by the Government. The Government did not provide to the Court the witness statements to which they referred in their submissions. In any event, the fact that over a period of several years the applicant's recollection of an extremely traumatic and stressful event differed in rather insignificant details does not in itself suffice to cast doubt on the overall veracity of her statements.

58. Furthermore, a number of serious and unresolved contradictions about the exact circumstances of the arrest and alleged release of Sultan Khatuyev arise in the documents cited in the Government's observations. While the Court will address these issues in more detail below under the procedural obligation of Article 2, it notes that the official investigation was unable to come up with a coherent picture of these crucial facts or even to question the persons directly involved in his apprehension.

59. Having regard to the previous cases concerning disappearances in Chechnya and in Ingushetia which have come before it (see, among others, *Bazorkina*, cited above; *Imakayeva*, cited above; *Luhuyev and Others v. Russia*, no. 69480/01, ECHR 2006-XIII (extracts); *Baysayeva v. Russia*, no. 74237/01, 5 April 2007; *Alikhadzhiyeva v. Russia*, no. 68007/01, 5 July 2007; *Medova v. Russia*, no. 25385/04, ECHR 2009-... (extracts)), the Court finds that in the context of the situation in the region, when a person is detained by unidentified servicemen without any subsequent acknowledgment of the detention, this can be regarded as life-threatening. The absence of Sultan Khatuyev or of any news of him for over five years supports this assumption.

60. Accordingly, the Court finds that the evidence available permits it to establish that Sultan Khatuyev must be presumed dead following his unacknowledged detention by State servicemen.

III. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

61. The applicant complained under Article 2 of the Convention that her husband had been killed by State agents and that the authorities had failed to carry out an effective investigation of the matter. Article 2 reads:

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

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

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

A. The parties' submissions

62. The Government first argued that the complaint was manifestly ill-founded and should be dismissed as such. They further contended that the domestic investigation had obtained no evidence to the effect that Sultan Khatuyev was dead or that any servicemen of the federal law-enforcement agencies had been involved in his kidnapping or alleged killing. The Government claimed that the investigation met the Convention requirement of effectiveness, as all measures available under national law were being taken to identify those responsible.

63. The applicant argued that Sultan Khatuyev had been detained by State servicemen and should be presumed dead in the absence of any reliable news of him for many years. The applicant also argued that the investigation had not met the effectiveness and adequacy requirements laid down by the Court's case-law. The applicant pointed out that the district prosecutor's office had not taken some crucial investigative steps. The investigation into Sultan Khatuyev's kidnapping had been opened 18 days after the events and then had been suspended and resumed a number of times – thus delaying the taking of the most basic steps. The relatives had not been properly informed of the most important investigative measures. The fact that the investigation had been ongoing for such a long period of time without producing any known results was further proof of its ineffectiveness. She also invited the Court to draw conclusions from the Government's unjustified failure to submit the documents from the case file to her or to the Court.

B. The Court's assessment

1. Admissibility

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

2. Merits

(a) The alleged violation of the right to life of Sultan Khatuyev

65. The Court has already found that the applicant's husband must be presumed dead following unacknowledged detention and that the death can be attributed to the State. In the absence of any justification in respect of the use of lethal force by State agents, the Court finds that there has been a violation of Article 2 in respect of Sultan Khatuyev.

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

66. The Court has on many occasions stated that the obligation to protect the right to life under Article 2 of 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. It has developed a number of guiding principles to be followed for an investigation to comply with the Convention's requirements (for a summary of these principles see *Bazorkina*, cited above, §§ 117-119).

67. In the present case, the kidnapping of Sultan Khatuyev was investigated. The Court must assess whether that investigation met the requirements of Article 2 of the Convention.

68. The Court notes at the outset that the Government disclosed no documents from the investigation. It therefore has to assess its effectiveness on the basis of the few documents submitted by the applicant and the information about its progress presented by the Government.

69. The Court notes that the authorities were immediately made aware of the disappearance by the applicant. The investigation in case no. 04600054 was instituted on 20 August 2004, that is, 18 days after Sultan Khatuyev's abduction. Such a postponement *per se* is liable to affect the investigation of a kidnapping in life-threatening circumstances, where crucial action has to be taken in the first days after the event. It also appears that within the following days the applicant, some of her relatives and two ROVD officials

were questioned. The applicant was granted victim status in August 2004. However, it appears that after that a number of crucial steps were delayed, or not taken at all. It is obvious that these investigative measures, if they were to produce any meaningful results, should have been taken immediately after the crime was reported to the authorities, and as soon as the investigation commenced. Such delays, for which there has been no explanation in the instant case, not only demonstrate the authorities' failure to act of their own motion but also constitute a breach of the obligation to exercise exemplary diligence and promptness in dealing with such a serious crime (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 94, ECHR 2004-XII).

70. A number of essential steps were never taken. Most notably, the Court finds it striking that by 4 June 2005 the investigators had yet failed to question the servicemen who had been directly involved in Mr Khatuyev's apprehension and alleged release (see paragraph 32 above). No documents were sought or obtained about the alleged apprehension and questioning of Mr Khatuyev. It does not appear that, apart from Mr U.I., his fellow detainees were questioned. In fact, the presentation of the events in the Government's observations seems to leave more questions than answers.

71. The Court also notes that even though the applicant was granted victim status in the investigation, she was only informed of the suspension and resumption of the proceedings, and not of any other significant developments. Thus, she learnt about her husband's alleged release from the FSB vehicle in Ordzhinikzevskaya from the Government observations submitted to the Court. Other essential information, including the dates of adjournments and suspensions of the investigation, has not been communicated to her. Accordingly, the investigators failed to ensure that the investigation received the required level of public scrutiny, or to safeguard the interests of the next of kin in the proceedings.

72. Finally, the Court notes that the investigation was adjourned and resumed on numerous occasions and that there were lengthy periods of inactivity on the part of the district prosecutor's office when no proceedings were pending. The district court criticised deficiencies in the proceedings and ordered remedial measures, but it does not appear that its instructions were complied with.

73. 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 ongoing, the Court notes that the investigation, having being repeatedly suspended and resumed and plagued by inexplicable delays, has been open for many years without producing any tangible results. Accordingly, the Court finds that the remedy relied on by the Government was ineffective in the circumstances and dismisses their preliminary objection. The Government argued that the applicant could have sought judicial review of the decisions of the investigating authorities in the context of the exhaustion of domestic remedies. The Court observes that the

applicant did, in fact, make use of that remedy, which eventually led to the resumption of the investigation. Nevertheless, the effectiveness of the investigation had already been undermined in its early stages by the authorities' failure to take necessary and urgent investigative measures. Moreover, the district court's instructions to the district prosecutor's office to investigate the crime effectively did not bring any tangible results for the applicant. The investigation was repeatedly suspended and resumed, but it appears that no significant investigative measures were taken to identify those responsible for the kidnapping. In such circumstances, the Court considers that the applicant could not be required to challenge in court every single decision of the district prosecutor's office. Accordingly, the Court finds that the remedy cited by the Government was ineffective in the circumstances and dismisses their preliminary objection as regards the applicant's failure to exhaust domestic remedies within the context of the criminal investigation.

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

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

75. The applicant relied on Article 3 of the Convention, submitting that Sultan Khatuyev had been subjected to inhuman or degrading treatment prohibited by Article 3 of the Convention and that as a result of her husband's disappearance and the State's failure to investigate it properly, she had endured mental suffering in breach of Article 3 of the Convention. Article 3 reads:

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

A. The parties' submissions

76. The Government disagreed with these allegations and argued that the investigation had not established that the applicant and Sultan Khatuyev had been subjected to inhuman or degrading treatment prohibited by Article 3 of the Convention.

77. The applicant maintained her submissions.

B. The Court's assessment

1. Admissibility

(a) The complaint concerning Sultan Khatuyev

78. The Court reiterates that allegations of ill-treatment must be supported by appropriate evidence. To assess this evidence, the Court adopts the standard of proof “beyond reasonable doubt” but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Ireland v. the United Kingdom*, cited above, § 161 *in fine*).

79. The Court has found it established that Sultan Khatuyev was detained on 2 August 2004 by federal forces and that no reliable news of him has been received since. It has also found that, in view of all the known circumstances, he can be presumed dead and that the responsibility for his death lies with the State authorities. However, the questions of the exact way in which he died and whether he was subjected to ill-treatment while in detention have not been elucidated. The Court considers that the applicant's reference to her conversation with Mr U.I. does not enable it to find beyond all reasonable doubt that Mr Khatuyev was ill-treated in detention. It thus finds that this part of the complaint has not been substantiated.

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

(b) The complaint concerning the applicant's psychological suffering

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

2. Merits

82. The Court has found on many occasions that in a situation of enforced disappearance close relatives of the victim may themselves be victims of treatment in violation of Article 3. 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 (see *Orhan v. Turkey*, no. 25656/94, § 358, 18 June 2002, and *Imakayeva*, cited above, § 164).

83. In the present case the Court notes that the applicant is the wife of the disappeared person and witnessed his abduction. For more than five years she has not had any news of him. During this period the applicant has

made numerous enquiries to various official bodies, both in writing and in person. Despite her attempts, the applicant has never received any plausible explanation or information about what became of Mr Khatuyev following his detention. The responses she received mostly denied State responsibility for the arrest or simply informed her that the investigation was ongoing. The Court's findings under the procedural aspect of Article 2 are also of direct relevance here.

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

V. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

85. The applicant further stated that Sultan Khatuyev had been detained in violation of the guarantees contained in Article 5 of the Convention, which reads, in so far as relevant:

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

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

...

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

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

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

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

A. The parties' submissions

86. The Government stressed that Sultan Khatuyev had not been detained, but only briefly apprehended in the car and then released as soon as his identity had been established. He was not listed among the persons

kept in detention centres and none of the regional law-enforcement agencies had information about his detention. In their additional observations the Government stated that Mr Khatuyev's detention had in fact been recorded at the Sunzhenskiy ROVD, but submitted no copies of the relevant documents or any other details.

87. The applicant reiterated the complaint.

B. The Court's assessment

1. Admissibility

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

2. Merits

89. 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*, cited above, § 122).

90. The Court has found that Sultan Khatuyev was apprehended by State servicemen on 2 August 2004. The information submitted by the parties shows that on the same day he had been delivered to the Sunzhenskiy ROVD and then transferred to the representatives of the FSB who put him in a car and went towards the FSB office in Magas. His detention was not acknowledged in a meaningful manner, was not duly logged in any custody records and there exists no official trace of his subsequent whereabouts or fate. In accordance with the Court's practice, this fact in itself must be considered a most serious failing, since it enables those responsible for an act of deprivation of liberty to conceal their involvement in a crime, to cover their tracks and to escape accountability for the fate of a detainee. Furthermore, the absence of detention records, noting such matters as the date, time and location of detention and the name of the detainee as well as the reasons for the detention and the name of the person effecting it, must be seen as incompatible with the very purpose of Article 5 of the Convention (see *Orhan*, cited above, § 371). In fact, the Government's argument points to the heart of the problem, because even though the evidence amply demonstrates that Mr Khatuyev had been deprived of his liberty by State agents, none of the safeguards against arbitrary detention contained in the domestic legal order had been employed.

91. The Court further considers that the authorities should have been more alert to the need for a thorough and prompt investigation of the applicant's complaints that her husband had been detained and taken away in life-threatening circumstances. However, the Court's findings above in relation to Article 2 and, in particular, the conduct of the investigation leave no doubt that the authorities failed to take prompt and effective measures to safeguard him against the risk of disappearance.

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

VI. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

93. The applicant alleged that the search carried out at her house on 2 August 2004 was illegal and constituted a violation of her right to respect for her home. It thus disclosed a violation of Article 8 of the Convention, which provides:

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

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

94. The Court notes that there is no evidence that the applicant properly raised her complaints alleging a breach of her right to respect for her home before the domestic authorities. But even assuming that in the circumstances of the present case no remedies were available, the events complained of took place on 2 August 2004, whereas the application was lodged on 28 March 2005. The Court thus concludes that this part of the application was lodged outside the six-month limit (see *Hazar and Others v. Turkey* (dec.), no. 62566/00 et seq., 10 January 2002, and *Musayeva and Others v. Russia* (dec.), no. 74239/01, 1 June 2006).

95. It follows that this part of the application was lodged out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

VII. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

96. The applicant complained that she had been deprived of effective remedies in respect of the violation of Article 2, contrary to Article 13 of the Convention, which provides:

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

A. The parties' submissions

97. The Government contended that the applicant had had effective remedies at her disposal as required by Article 13 of the Convention and that the authorities had not prevented her from using them. The applicant had had an opportunity to challenge the acts or omissions of the investigating authorities in court and had availed herself of it. They added that participants in criminal proceedings could also claim damages in civil proceedings and referred to cases where victims in criminal proceedings had been awarded damages from state bodies and, in one instance, the prosecutor's office. In sum, the Government submitted that there had been no violation of Article 13.

98. The applicant reiterated the complaint.

B. The Court's assessment

1. Admissibility

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

2. Merits

100. The Court reiterates that in circumstances where, as here, a criminal investigation into a disappearance has been ineffective and the effectiveness of any other remedy that might have existed, including civil remedies suggested by the Government, has consequently been undermined, the State has failed in its obligation under Article 13 of the Convention (see *Khashiyev and Akayeva*, cited above, § 183).

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

VIII. ALLEGED VIOLATIONS OF ARTICLES 34 AND 38 OF THE CONVENTION

102. The applicant submitted that she was subjected to threats in relation to her complaint to the Court, as a result of which she was forced to seek asylum abroad. She also argued that the Government's failure to submit the

documents requested by the Court, namely the entire criminal investigation file, disclosed a failure to comply with their obligations under Articles 34 and 38 § 1 (a) of the Convention. The Court finds that in the circumstances of the present case the above issues should be examined under Article 34 of the Convention, which provides as follows:

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

A. Threats to the applicant

103. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual application instituted by Article 34 that applicants should be able to communicate freely with the Court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints. In this context, “pressure” includes not only direct coercion and flagrant acts of intimidation, but also other improper indirect acts or contacts designed to dissuade or discourage applicants from using a Convention remedy. The issue of whether or not contacts between the authorities and an applicant amount to unacceptable practices from the standpoint of Article 34 must be determined in the light of the particular circumstances of the case. In the context of the questioning of applicants about their applications under the Convention by authorities exercising a domestic investigative function, this will depend on whether the procedures adopted have involved a form of illicit and unacceptable pressure which may be regarded as hindering the exercise of the right of individual application (see, for example, *Aydın v. Turkey*, 25 September 1997, §§ 115-117, *Reports of Judgments and Decisions* 1997-VI, and *Salman v. Turkey* [GC], no. 21986/93, § 130, ECHR 2000-VII).

104. Turning to the present case, the Court notes that the applicant has not submitted any details about the alleged pressure put on her by State representatives in relation to her complaint. She failed to indicate the dates and circumstances of such incidents or to specify who had been threatening her. Her statements are extremely vague and unspecific. While the Court sympathises with the applicant, who had been subjected to prolonged stress on account of her husband's disappearance and exasperated by the authorities' failure to provide an adequate response to her grievances, on the basis of her allegations it is unable to come to the conclusion that there has been a breach of Article 34 in the present case.

B. The failure to disclose documents from the criminal investigation file

105. The Court points out that it has already taken note of the Government's failure to produce a copy of the investigation file and drawn inferences from it. In view of the main objective of Article 34 of the Convention, which is to ensure the effective operation of the right of individual petition, the Court does not find that its provisions have been breached in the present case.

IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

106. Article 41 of the Convention provides:

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

A. Pecuniary damage

107. The applicant claimed compensation for pecuniary damage sustained as a result of her husband's disappearance. On behalf of herself and her two sons, born in 1988 and 1990, the applicant alleged that Mr Khatuyev had been the family's sole breadwinner. He worked as a day labourer on construction sites, and even though no official records of his earnings existed, the applicant submitted that his monthly pay had averaged between 600 and 800 United States dollars (USD). The applicant relied on the Law on Minimal Living Costs and the subsequent decrees by the Russian Government which had established the minimum living costs per person at different periods of time. The claim as to her loss of future earnings was based on the Ogden actuarial tables and on the assumption that she and her minor sons would have continued to benefit from her husband's salary.

108. Under this heading the applicant claimed a total of 919,347 Russian roubles (RUB) (20,992 euros (EUR)).

109. The Government regarded these claims as based on suppositions and unfounded. They noted that the applicant had not made use of the domestic avenues for obtaining compensation for the loss of a breadwinner.

110. The Court reiterates that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention, and that this may, in an appropriate case, include compensation in respect of loss of earnings. Having regard to its conclusions above, it finds that there is a direct causal link between the violation of Article 2 in

respect of the applicant's husband and her loss of the financial support which he could have provided.

111. Having regard to the applicant's submissions and the absence of any conclusive data about Mr Khatuyev's earnings at the time of his apprehension, the Court awards EUR 10,000 to the applicant in respect of pecuniary damage plus any tax that may be chargeable to her.

B. Non-pecuniary damage

112. As regards non-pecuniary damage, the applicant claimed EUR 100,000 for the suffering she had endured as a result of the loss of her husband and the indifference shown by the authorities towards her.

113. The Government considered the amount claimed to be exaggerated.

114. The Court has found a violation of Articles 2, 5 and 13 of the Convention on account of the unacknowledged detention and disappearance of the applicant's relative. The applicant herself has been found to have been the victim of a violation of Article 3 of the Convention. The Court thus accepts that she has suffered non-pecuniary damage which cannot be compensated for solely by the findings of violations. It awards the applicant EUR 60,000, plus any tax that may be chargeable thereon.

C. Request for investigation

115. The applicant also requested, referring to Article 41 of the Convention, that “an independent investigation which would comply with the requirements of the Convention be conducted into her husband's abduction”. She relied in this connection on the case of *Assanidze v. Georgia* ([GC], no. 71503/01, §§ 202-203, ECHR 2004-II).

116. The Government argued that the investigation into the abduction of Mr Khatuyev had been carried out in full compliance with domestic law.

117. Having regard to its previous practice in similar cases, the Court finds it most appropriate to leave it to the respondent Government to choose the means to be used in the domestic legal order in order to discharge their legal obligation under Article 46 of the Convention (see *Kukayev v. Russia*, no. 29361/02, § 134, 15 November 2007).

D. Costs and expenses

118. The applicant was represented by lawyers from the NGO EHRAC/Memorial Human Rights Centre. The aggregate claim in respect of costs and expenses related to the applicant's legal representation amounted to EUR 2,165 (2,019 pounds sterling (GBP)). They submitted the following breakdown of costs:

- (a) GBP 817 for eight hours and ten minutes of legal work by United Kingdom-based lawyers at a rate of GBP 100 per hour;
- (b) GBP 1,027 for translation costs, as certified by invoices; and
- (c) GBP 175 for administrative and postal expenses.

119. The Government disputed the reasonableness of and justification for the amounts claimed under this heading.

120. The Court has to establish first whether the costs and expenses indicated by the applicant's relative were actually incurred and, secondly, whether they were necessary (see *McCann and Others v. the United Kingdom*, 27 September 1995, § 220, Series A no. 324).

121. Having regard to the details of the information and legal representation contracts submitted by the applicant, the Court is satisfied that these rates are reasonable and reflect the expenses actually and necessarily incurred by the applicant's representatives.

122. Having regard to the details of the claims submitted by the applicant, the Court awards her the amount claimed of EUR 2,165, together with any value-added tax that may be chargeable to the applicant, the net award to be paid into the representatives' bank account in the UK, as identified by the applicant.

E. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join to the merits the Government's objection as to non-exhaustion of criminal domestic remedies and rejects it;
2. *Declares* the complaints under Articles 2, 3, 5 and 13 of the Convention admissible and the remainder of the application inadmissible;
3. *Holds* that there has been a substantive violation of Article 2 of the Convention in respect of Sultan Khatuyev;
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 Sultan Khatuyev disappeared;

5. *Holds* that there has been a violation of Article 3 of the Convention in respect of the applicant;
6. *Holds* that there has been a violation of Article 5 of the Convention in respect of Sultan Khatuyev;
7. *Holds* that there has been a violation of Article 13 of the Convention in respect of the alleged violation of Article 2 of the Convention;
8. *Holds* that there has been no breach of the provisions of Article 34 of the Convention;
9. *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 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of pecuniary damage to the applicant;
 - (ii) EUR 60,000 (sixty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage to the applicant;
 - (iii) EUR 2,165 (two thousand one hundred and sixty-five euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be paid into the representatives' bank account in the UK;
 - (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;
10. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 April 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President