



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

FIRST SECTION

CASE OF TUPCHIYEVA v. RUSSIA

(Application no. 37461/05)

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 Tupchiyeva v. Russia,

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

Christos Rozakis, *President*,

Anatoly Kovler,

Elisabeth Steiner,

Dean Spielmann,

Sverre Erik Jebens,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 25 March 2010,

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

PROCEDURE

1. The case originated in an application (no. 37461/05) 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 Eru Tupchiyeva (also known as Dzhabrailova) (“the applicant”), on 29 September 2005.

2. The applicant was 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 the Deputy Minister of Justice Mr A. Savenkov and subsequently by the Representative of the Russian Federation at the European Court of Human Rights Mr G. Matyushkin.

3. On 18 March 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 1948 and lives in Shali, Chechnya. She is the mother of Vakhit (also known as Akhmed) Dzhabrailov, who was born in 1976.

A. Disappearance of Vakhit Dzhabrailov

1. The applicant's account

6. At the material time the town of Shali was under the full control of Russian federal forces. Military checkpoints were located on the roads leading to and from the town. The area was under curfew.

7. The applicant's house at 56 Kirova Street, Shali, Chechnya, consisted of three dwellings. One of the applicant's sons, Vakhit, lived with her in one dwelling; two other sons of the applicant lived with their families in the others.

8. On the night of 2-3 January 2003 the applicant, Vakhit Dzhabrailov and their relatives were at home. At about 5.30 a.m. a group of fifteen to twenty armed men in camouflage uniforms arrived at their house in a white GAZ minivan with tented body ('Газель') and a grey UAZ minivan ('Таблетка'). The vehicles did not have registration numbers. The men unloaded a ladder and used it to climb over the fence into the applicant's yard.

9. The men neither identified themselves nor produced any documents. They had Slavic appearance and spoke Russian without accent. The applicant and her relatives thought that they were Russian military servicemen.

10. The men split into two groups and went into the dwellings. Some of the soldiers remained on the street and ordered the neighbours to get back in their houses. The first group broke into the house where the applicant's son Mr R. Dzh. lived with his family. They took him outside and put him on the floor of the UAZ minivan. Mr R. Dzh. was shown to a man in the vehicle and then immediately released.

11. In another house the servicemen detained Vakhit Dzhabrailov and took him outside. They put him face down on the ground. Vakhit Dzhabrailov, who was suffering from tuberculosis, was not allowed to put on warm clothing. The applicant asked the soldiers where they were taking Vakhit, but did not receive any response. After that the soldiers put Vakhit in the UAZ minivan. Immediately afterwards one of the officers contacted

someone via a portable radio and reported that they had taken someone. After that the vehicles drove away in the direction of the local mosque and the Shali district department of the interior (the ROVD).

12. The abduction of Vakhit Dzhabrailov was witnessed by a number of the applicant's relatives and neighbours. The applicant has had no news of Vakhit Dzhabrailov since the day of his abduction.

13. The description of the circumstances surrounding the disappearance of the applicant's son is based on the following documents: an account by the applicant dated 22 December 2003, an account by the applicant's neighbour Ms N. U. dated 12 December 2003, an account by the applicant's son Mr R. Dzh. dated 10 November 2005, accounts by the applicant's relatives Ms A. Al. and Ms S.T., both dated 10 November 2005, and an account by the applicant's neighbour Ms A. Ak. dated 17 November 2005.

2. Information submitted by the Government

14. The Government did not challenge most of the account presented by the applicant. According to their submission "... criminal case no. 22015 was opened by the Shali district prosecutor's office after Ms E. Tupchiyeva (Dzhabrailova) had complained that unidentified persons had abducted V. Dzhabrailov from 56 Kirova Street in Shali, Chechnya at about 10 a.m. on 3 January 2003..."

B. The search for Vakhit Dzhabrailov and the investigation

1. The applicant's account

15. In the morning of 3 January 2003 the applicant and her relatives started searching for Vakhit Dzhabrailov. They also contacted, both in person and in writing, various official bodies, such as the Russian President, the Envoy of the President of the Russian Federation for Ensuring Human Rights and Freedoms in the Chechen Republic, the Shali district administration, the Chechen administration, military commanders' offices and prosecutors' offices at different levels, describing in detail the circumstances of their relative's abduction and asking for help in establishing his whereabouts. The applicant retained copies of some of those letters and the authorities' replies and submitted them to the Court.

16. According to the applicant, at some point after the events one of the servicemen who had been on duty at the ROVD on the night of the abduction told her that on the night of 3 January 2003 the minivan with Vakhit Dzhabrailov had been driven up to the ROVD building and left shortly afterwards.

17. On 5 January 2003 the head of the Shali district administration forwarded the applicant's complaint about her son's abduction to the ROVD.

18. On 27 January 2003 the district prosecutor's office instituted an investigation into the disappearance of Vakhit Dzhabrailov under Article 126 § 2 of the Russian Criminal Code (aggravated kidnapping). The case file was given the number 22015. The applicant was informed about it on 1 July 2004.

19. On 13 November 2003 the applicant wrote to the Chechnya prosecutor's office. She described the circumstances of her son's abduction and stated that her requests to various law-enforcement bodies had not produced any results. She pointed out that the Shali district prosecutor's office (the district prosecutor's office) had failed to initiate an investigation into her son's abduction. She expressed her concerns about her son's state of health as at the time of his abduction Vakhit Dzhabrailov had been suffering from tuberculosis.

20. On 3 December 2003 the applicant's representatives requested the district prosecutor's office to inform them about the following: whether the authorities had initiated a criminal investigation into the abduction of Vakhit Dzhabrailov; whether the applicant had been granted victim status in the criminal case, and what measures had been taken to establish the identity of the perpetrators of the kidnapping and the whereabouts of the applicant's son. No reply was given to this request.

21. On 1 June 2004 the applicant's representatives reiterated their request of 3 December 2003.

22. On 1 July 2004 the district prosecutor's office informed the applicant's representatives that on 27 January 2003 they had instituted an investigation into the disappearance of Vakhit Dzhabrailov and that the case file had been given the number 22015. According to the letter, on an unspecified date the applicant had been granted victim status in the criminal proceedings.

23. On 7 August 2004 the military prosecutor's office of the United Group Alignment (the military prosecutor's office of the UGA) forwarded the applicant's request for assistance in the search for her son to the military prosecutor's office of military unit no. 20116.

24. On 17 February 2005 the Shali district military commander's office (the district military commander's office) informed the applicant that they had examined her complaint about the abduction of Vakhit Dzhabrailov and forwarded a number of requests for information to various law-enforcement bodies.

25. On 11 March 2005 the district military commander's office informed the applicant that in connection with the abduction of her son the ROVD had opened operational search file no. 71409 and measures aimed at establishing his whereabouts were under way.

26. On 19 July 2005 the applicant's representatives requested the district prosecutor's office to provide information concerning the progress of the investigation in the criminal case, the date of suspension of the criminal

proceedings and the results of examination by the investigative authorities of the applicant's version of the involvement of Russian military forces in the abduction of Vakhit Dzhabrailov. The representatives also requested to be informed whether the applicant could be provided with access to the investigation file. No reply was given to this request.

27. On 5 October 2005 the applicant's representatives reiterated their request for an update on the criminal investigation.

28. On 12 November and 12 December 2005 the district prosecutor's office informed the applicant's representatives that on 8 July 2004 they had suspended the investigation in the criminal case. They also stated that the investigation had not established the involvement of Russian military servicemen in the abduction. The letters further invited the applicant to familiarise herself with those documents from the investigation file "which concerned her interests as a victim in the criminal case".

29. According to the applicant, between January 2003 and December 2005 the investigators from the military prosecutor's office questioned twelve witnesses from her relatives and neighbours about Vakhit Dzhabrailov.

2. Information submitted by the Government

30. Without submitting any of the relevant documents or providing the dates of the investigating measures the Government stated that the investigation of the abduction of Vakhit Dzhabrailov had been initiated by the district prosecutor's office and that the applicant had been granted victim status in the criminal case.

31. On an unspecified date the investigators questioned the applicant, who stated that on 3 January 2003 she had been at home. At about 10 a.m. a group of armed men in camouflage uniforms had broken into her house. At first the men had taken away her son Ramzan; however, they had brought him back soon afterwards and taken her second son, Vakhit Dzhabrailov. The men placed him in a grey UAZ minivan and took him away to an unknown destination. At some point later the investigators again questioned the applicant, who stated that it was one of her sons, Mr V. Dz., who had informed her about the visit of the abductors' car to the ROVD on the night of the abduction and that he, in his turn, had obtained this information from taxi drivers who had witnessed the vehicle arriving at the ROVD and leaving some time later.

32. On an unspecified date the investigators questioned the applicant's neighbour Ms A. Ak., who stated that at about 10 a.m. on 3 January 2003 she had seen from her window a tented GAZ vehicle and a grey UAZ minivan pulling over to the applicant's gate. A number of men in camouflage uniforms who were armed with automatic weapons had got out of the vehicles and fetched a ladder from the boot of the GAZ car. They had used the ladder to climb over the applicant's gate; they got into the

applicant's yard and opened the gate from inside. About ten minutes later the armed men brought the applicant's son Mr R. Dzh. to the vehicles; a few minutes later they took him back to the house. After that the intruders took the applicant's other son, Vakhit Dzhabrailov, placed him in the grey minivan and drove away. According to the witness, in the UAZ minivan she had noticed a man in camouflage uniform of Caucasian appearance and to whom the applicant's sons had been shown.

33. On an unspecified date the investigators questioned the applicant's neighbour Ms N. U. who provided a statement similar to the one given by Ms A. Ak.

34. On an unspecified date the investigators questioned the applicant's neighbour Mr A.T. who stated that at about 10 a.m. on 3 January 2003 he had heard screams coming from the applicant's house and the noise of a vehicle driving down the street. He had immediately gone to the applicant's house where he had been told that armed men had taken away Vakhit Dzhabrailov.

35. According to the Government, the investigators also questioned witnesses Ms T.M. and Ms Z.D. whose statements had not provided any significant information for the investigation.

36. On an unspecified date the investigators conducted the crime scene examination at the applicant's house. Nothing was collected from the scene.

37. Further, on unspecified dates the investigators forwarded a number of requests to competent authorities, including various district departments of the interior and district prosecutor's offices in Chechnya, the Shali department of the Federal Security Service (the FSB), the military commander of the United Group Alignment in the Northern Caucasus (the UGA), the military prosecutor of military unit no. 20116, the Chechnya Ministry of the Interior (the Chechnya MVD) and the Federal Department of Execution of Punishment in Kabardino-Balkaria. According to the responses received from the agencies, they had not conducted any special operations on 3 January 2003 in Shali and did not have any information about Vakhit Dzhabrailov.

38. The Government also submitted that on an unspecified date the investigators had forwarded requests to establish the owners of the UAZ minivan used by the abductors. However, the Government did not specify either where the requests had been forwarded or whether any response had been given to them.

39. The Government stated that the investigation into the abduction of Vakhit Dzhabrailov had not established the involvement of federal forces in the incident.

40. The Government further submitted that although the investigation had failed to establish either the whereabouts of Vakhit Dzhabrailov or the perpetrators of his abduction, it was still in progress.

41. Despite specific requests by the Court the Government did not disclose any documents of criminal case no. 22015. The Government stated that a copy of the investigation file could not be submitted to the Court owing to the absence of any guarantees on the part of the Court of non-disclosure of the secret data contained in the investigation file. In this respect the Government referred to Article 161 of the Criminal Procedure Code, since the file contained information concerning participants in criminal proceedings. They also cited, by way of comparison, the Rome Statute of the International Criminal Court of 17 July 1998 (Articles 70 and 72) and the Statute of the International Criminal Tribunal for the former Yugoslavia (Articles 15 and 22) and argued that these instruments provided for personal responsibility for a breach of the rules of confidentiality.

II. RELEVANT DOMESTIC LAW

42. 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

A. The parties' submissions

43. 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 Vakhit Dzhabrailov had not yet been completed. They also argued that it had been open to the applicant to pursue civil complaints but that she had failed to do so.

44. The applicant contested that objection. She stated that the only effective remedy in her case was the criminal investigation, which had proved to be ineffective.

B. The Court's assessment

45. The Court will examine the arguments of the parties in the light of the provisions of the Convention and its relevant practice (for a relevant

summary, see *Estamirov and Others v. Russia*, no. 60272/00, §§ 73-74, 12 October 2006).

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

47. As regards a civil action to obtain redress for damage sustained through the alleged illegal acts or unlawful conduct of State agents, the Court has already found in a number of similar cases that this procedure alone cannot be regarded as an effective remedy in the context of claims brought under Article 2 of the Convention (see *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, §§ 119-121, 24 February 2005, and *Estamirov and Others*, cited above, § 77). In the light of the above, the Court confirms that the applicant was not obliged to pursue civil remedies.

48. As regards criminal-law remedies, the Court observes that the applicant complained to the law-enforcement authorities shortly after the kidnapping of Vakhit Dzhabrailov and that an investigation has been pending since 27 January 2003. The applicant and the Government dispute the effectiveness of the investigation of the kidnapping.

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 the men who had taken away Vakhit Dzhabrailov had been State agents. In support of her complaint she referred to the following facts. At the material time Shali had been under total control of federal troops and the area was under strict curfew. There had been Russian military checkpoints on the roads leading to and from Shali. The armed men who had abducted Vakhit Dzhabrailov had Slavic features and spoke Russian without an accent, which proved that they were not of Chechen origin. The men had arrived at the applicant's house at night, which indicated that they had been able to circulate freely past curfew. The men acted in a manner similar to that of special forces carrying out identity checks. They were wearing specific camouflage uniform, were armed and had portable radios. Since her son 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 unidentified armed men had kidnapped Vakhit Dzhabrailov. They further contended that the investigation of the incident was pending, that there was no evidence that the men had been State agents and that there were therefore no grounds for holding the State liable for the alleged violations of the applicant's rights. They further argued that there was no convincing evidence that the applicant's son was dead. The Government raised a number of objections to the applicant's presentation of facts. The fact that the perpetrators of the abduction spoke unaccented Russian and were wearing camouflage uniforms did not mean that these men could not have been members of illegal armed groups. The Government further alleged that the applicant's description of the circumstances surrounding the abduction was inconsistent. In particular, the applicant had submitted to the domestic investigators that the abductors had arrived at her house around 10 a.m. whereas in her complaint to the Court she had alleged that they had arrived at about 5.30 a.m.; that she had failed to inform the investigators about the officer from the ROVD who had confirmed that the abductors' vehicles had stopped at the ROVD after the abduction and that the applicant's neighbour Ms A.Ak. had informed the domestic investigators about the man with Caucasian appearance, but had failed to submit this information to the Court. The Government referred to the witness statements made to the domestic investigation, but did not submit them to the Court.

B. The Court's evaluation

52. The Court observes that in its extensive jurisprudence it has developed a number of general principles relating to the establishment of the truth of matters 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*, § 161, Series A no. 25).

53. The Court notes that despite its requests for a copy of the investigation file into the abduction of Vakhit Dzhabrailov, the Government produced none of the 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-VIII (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 son can be presumed dead and whether his death can be attributed to the authorities.

55. The applicant alleged that the persons who had taken Vakhit Dzhabrailov away on 3 January 2003 and then killed him were State agents.

56. The Government suggested in their submissions that the abductors of Vakhit Dzhabrailov may have been members of paramilitary groups. However, this allegation was not specific and the Government did not submit any material to support it. The Court would stress in this regard that the evaluation of the evidence and the establishment of the facts is a matter for the Court, and it is incumbent on it to decide on the evidentiary value of the documents submitted to it (see *Çelikkilek v. Turkey*, no. 27693/95, § 71, 31 May 2005).

57. The Court notes that the applicant's allegation is supported by the witness statements collected by the applicant and by the investigation. It finds that the fact that a large group of armed men in uniform during curfew hours, in the area fully controlled by the authorities, was able to move freely in the area and proceeded to check identity documents and take the applicant's son away from his home strongly supports the applicant's allegation that these were State servicemen conducting a security operation. In her application to the authorities the applicant alleged that Vakhit Dzhabrailov had been detained by unknown servicemen and requested the investigation to look into that possibility (see paragraph 26 above). The domestic investigation also accepted factual assumptions as presented by the applicant, and took steps to check whether federal servicemen were involved in the kidnapping (see paragraph 28 above), but it does not appear that any serious steps were taken in that direction.

58. The Government questioned the credibility of the applicant's statements in view of certain discrepancies relating to the exact circumstances of the arrests and the description of the hours immediately following the detention. The Court notes in this respect that no other elements underlying her submissions of facts have been disputed by the Government and that the latter did not furnish the Court with the witness statements to which they referred in their submissions. In the Court's view, the absence of anything to substantiate the Government's position in this respect and the fact that the Government did not dispute the underlying account of the abduction, those alleged inconsistencies do not in themselves suffice to cast doubt on the overall veracity of the applicant's statements.

59. The Court observes that where the applicant makes out a *prima facie* case and the Court is prevented from reaching factual conclusions owing to a lack of relevant documents, it is for the Government to argue conclusively

why the documents in question cannot serve to corroborate the allegations made by the applicant, or to provide a satisfactory and convincing explanation of how the events in question occurred. The burden of proof is thus shifted to the Government and if they fail in their arguments, issues will arise under Article 2 and/or Article 3 (see *Toğcu v. Turkey*, no. 27601/95, § 95, 31 May 2005, and *Akkum and Others v. Turkey*, no. 21894/93, § 211, ECHR 2005-II).

60. Taking into account the above elements, the Court is satisfied that the applicant has made a *prima facie* case that her son was taken away by State servicemen. The Government's statement that the investigators had not found any evidence to support the involvement of the federal forces in the kidnapping or their general reference to the possibility of illegal insurgents' involvement in the crime is insufficient to discharge them from the above-mentioned burden of proof. Having examined the documents submitted by the applicant, and drawing inferences from the Government's failure to submit the remaining documents which were in their exclusive possession or to provide another plausible explanation for the events in question, the Court finds that Vakhit Dzhabrailov was arrested on 3 January 2003 by State servicemen during an unacknowledged security operation.

61. There has been no reliable news of Vakhit Dzhabrailov since the date of the kidnapping. His name has not been found in any official detention facility records. Finally, the Government have not submitted any explanation as to what happened to him after his arrest.

62. Having regard to the previous cases concerning disappearances in Chechnya which have come before it (see, among others, *Bazorkina*, cited above; *Imakayeva*, cited above; *Luluyev and Others v. Russia*, no. 69480/01, ECHR 2006-XIII (extracts); *Baysayeva v. Russia*, no. 74237/01, 5 April 2007; *Akhmadova and Sadulayeva*, cited above; and *Alikhadzhiyeva v. Russia*, no. 68007/01, 5 July 2007), the Court finds that in the context of the conflict in the Republic, 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 Vakhit Dzhabrailov or of any news of him for more than six years supports this assumption.

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

III. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

64. The applicant complained under Article 2 of the Convention that her son had been deprived of his life by Russian servicemen and that the domestic authorities had failed to carry out an effective investigation of the matter. Article 2 reads:

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

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

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

A. The parties' submissions

65. The Government contended that the domestic investigation had obtained no evidence to the effect that Vakhit Dzhabrailov 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 into the kidnapping of the applicant's son met the Convention requirement of effectiveness, as all measures available under national law were being taken to identify those responsible.

66. The applicant argued that Vakhit Dzhabrailov had been detained by State servicemen and should be presumed dead in the absence of any reliable news of him for more than six 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 Vakhit Dzhabrailov's kidnapping had been opened several weeks after the events and then had been suspended and resumed a number of times, thus delaying the taking of the most basic steps, and that she had not been properly informed of the most important investigative measures. The fact that the investigation had been pending for such a long period of time without producing any known results was further proof of its ineffectiveness. The applicant 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

67. 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 (see paragraph 49 above). The complaint under Article 2 of the Convention must therefore be declared admissible.

2. Merits

(a) The alleged violation of the right to life of Vakhit Dzhabrailov

68. The Court has already found that the applicant's son must be presumed dead following unacknowledged detention by State servicemen. In the absence of any justification put forward by the Government, the Court finds that his death can be attributed to the State and that there has been a violation of Article 2 in respect of Vakhit Dzhabrailov.

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

69. 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).

70. In the present case, the kidnapping of Vakhit Dzhabrailov was investigated. The Court must assess whether that investigation met the requirements of Article 2 of the Convention.

71. The Court notes at the outset that none of the documents from the investigation were disclosed by the Government. It therefore has to assess the effectiveness of the investigation on the basis of the few documents submitted by the applicant and the information about its progress presented by the Government.

72. The Court notes that the authorities were made aware of the crime by the applicant's submission on 5 January 2003 the latest (see paragraph 17 above). The investigation in case no. 22015 was instituted on 27 January 2003, twenty-two days after the authorities had become aware of Vakhit Dzhabrailov's abduction. Such a postponement *per se* was liable to affect the investigation of the kidnapping in life-threatening circumstances, where

crucial action has to be taken in the first days after the event. Further, it is not possible to assess whether a number of investigating steps had been delayed, in view of the Government's failure to provide the Court with relevant information (see paragraphs 30 and 41 above), but it is clear that a number of the most crucial investigating measures had not been taken at all. For instance, the investigators did not question the local military commander about those who could have obtained his permission to drive around past curfew; they did not question the servicemen who had been on duty at the ROVD on 3 January 2003; they failed to establish the identity of the owners of the tented GAZ vehicle used by the abductors, and they did not question the applicant's relatives who had been present during the abduction. Further, it does not appear that the investigators attempted to question the applicant's son Mr V.D. and the taxi drivers who had seen the abductors' vehicle driving on the premises of the ROVD shortly after the events (see paragraph 31 above). 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).]

73. The Court also notes that even though the applicant was eventually granted victim status in the investigation concerning the abduction of her son, she was only informed of the suspension and resumption of the proceedings, and not of any other significant developments. 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.

74. Finally, the Court notes that the investigation was suspended and resumed on several occasions and that there were lengthy periods of inactivity of the district prosecutor's office when no proceedings were pending.

75. Having regard to the limb of the Government's 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 pending for many years without producing tangible results. 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.

76. 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 Vakhit Dzhabrailov, in breach of Article 2 in its procedural aspect.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

77. The applicant relied on Article 3 of the Convention, submitting that as a result of her son'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

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

79. The applicant maintained her submissions.

B. The Court's assessment

1. Admissibility

80. The Court notes that this 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

81. 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).

82. In the present case the Court notes that the applicant is the mother of the disappeared person, who witnessed his abduction. For more than six years she has not had any news of the missing man. During this period the applicant has made enquiries of various official bodies, both in writing and

in person, about her missing son. Despite her attempts, the applicant has never received any plausible explanation or information about what became of him following his detention. The responses she received mostly denied State responsibility for her son's 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.

83. 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

84. The applicant further stated that Vakhit Dzhabrailov 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

85. The Government asserted that no evidence had been obtained by the investigators to confirm that Vakhit Dzhabrailov had been deprived of his liberty. He was not listed among the persons kept in detention centres and

none of the regional law-enforcement agencies had information about his detention.

86. The applicant reiterated the complaint.

B. The Court's assessment

1. Admissibility

87. 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

88. 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).

89. The Court has found that Vakhit Dzhabrailov was taken away by State servicemen on 3 January 2003 and has not been seen since. His detention was not acknowledged, was not logged in any custody records and there exists no official trace of his subsequent whereabouts or fate. In accordance with the Court's practice, this fact in itself must be considered a most serious failing, since it enables those responsible for an act of deprivation of liberty to conceal their involvement in a crime, to cover their tracks and to escape accountability for the fate of a detainee. Furthermore, the absence of detention records, noting such matters as the date, time and location of detention and the name of the detainee as well as the reasons for the detention and the name of the person effecting it, must be seen as incompatible with the very purpose of Article 5 of the Convention (see *Orhan*, cited above, § 371).

90. 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 son had been detained and taken away in life-threatening circumstances. However, the Court's findings above, in relation to Article 2 and in particular to 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.

91. In view of the foregoing, the Court finds that Vakhit Dzhabrailov 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 13 OF THE CONVENTION

92. The applicant complained that she had been deprived of effective remedies in respect of the aforementioned violations, 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

93. 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. They further 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 from the prosecutor's office. In sum, the Government submitted that there had been no violation of Article 13.

94. The applicant reiterated the complaint.

B. The Court's assessment

1. *Admissibility*

95. 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*

96. The Court reiterates that in circumstances where, as here, a criminal investigation into the 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).

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

98. As regards the applicant's reference to Articles 3 and 5 of the Convention, the Court considers that in the circumstances no separate issue arises in respect of Article 13, read in conjunction with Articles 3 and 5 of the Convention (see *Kukayev v. Russia*, no. 29361/02, § 119, 15 November 2007, and *Aziyevy v. Russia*, no. 77626/01, § 118, 20 March 2008).

VII. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

99. The applicant complained that she had been discriminated against in the enjoyment of her Convention rights, because the violations of which she complained had taken place because she was a resident in Chechnya and because of her ethnic background as a Chechen. This was contrary to Article 14 of the Convention, which reads as follows:

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

100. The Court observes that no evidence has been submitted to it that suggests that the applicant was treated differently from persons in an analogous situation without objective and reasonable justification, or that she has ever raised this complaint before the domestic authorities. It thus finds that this complaint has not been substantiated.

101. 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.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

102. 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

103. The applicant claimed damages in respect of loss of earnings by her son after his arrest and subsequent disappearance. The applicant claimed a total of 482,104 Russian roubles (RUB) under this heading (13,774 euros (EUR)).

104. She claimed that her son had been unemployed at the time of his arrest, and that in that case the calculation should be made on the basis of the subsistence level established by national law. She calculated his earnings for the period, taking into account an average inflation rate of 13.67%. Her calculations were also based on the actuarial tables for use in personal injury and fatal accident cases published by the United Kingdom Government Actuary's Department in 2007 ("Ogden tables").

105. The Government regarded these claims as unsubstantiated. They also pointed to the existence of domestic statutory machinery for the provision of a pension for the loss of the family breadwinner.

106. 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 above conclusions, it finds that there is a direct causal link between the violation of Article 2 in respect of the applicant's son and the loss by the applicant of the financial support which he could have provided. Having regard to the applicant's submissions and the fact that Vakhit Dzhabrailov was not employed at the time of his abduction, the Court awards EUR 10,000 to the applicant in respect of pecuniary damage, plus any tax that may be chargeable on that amount.

B. Non-pecuniary damage

107. The applicant claimed EUR 70,000 in respect of non-pecuniary damage for the suffering she had endured as a result of the loss of her son, the indifference shown by the authorities towards her and the failure to provide any information about his fate.

108. The Government found the amounts claimed excessive.

109. 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 son. The applicant herself has been found to have been 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. Costs and expenses

110. The applicant was represented by the SRJI. They submitted an itemised schedule of costs and expenses that included research and interviews in Ingushetia and Moscow, at a rate of EUR 50 per hour for the work in the area of exhausting domestic remedies and of EUR 150 per hour for the drafting of submissions to the Court. The aggregate claim in respect

of costs and expenses related to the applicant's legal representation amounted to EUR 7,301.

111. The Government did not dispute the reasonableness of and justification for the amounts claimed under this heading.

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

113. 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 incurred by the applicant's representatives.

114. As to whether the costs and expenses were necessary, the Court notes that this case was rather complex and required a certain amount of research and preparation. It notes at the same time, that due to the application of Article 29 § 3 in the present case, the applicant's representatives submitted their observations on admissibility and merits in one set of documents. The Court thus doubts that legal drafting was necessarily time-consuming to the extent claimed by the representatives.

115. Having regard to the details of the claims submitted by the applicant, the Court awards her the amount of EUR 5,500 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 Netherlands, as identified by the applicant.

D. Default interest

116. 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 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 Vakhit Dzhabrailov;

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 Vakhit Dzhabrailov 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 Vakhit Dzhabrailov;
7. *Holds* that there has been a violation of Article 13 of the Convention in conjunction with Article 2 of the Convention;
8. *Holds* that no separate issues arise under Article 13 of the Convention in respect of the alleged violations of Articles 3 and 5;
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, to be converted into Russian roubles at the date of settlement, save in the case of the payment in respect of costs and expenses:
 - (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 5,500 (five thousand five hundred 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 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;
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