

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

THIRD SECTION

CASE OF MAGOMAYEV v. RUSSIA

(Application no. 10829/11)

JUDGMENT

STRASBOURG

26 July 2022

This judgment is final but it may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Magomayev v. Russia,

The European Court of Human Rights (Third Section), sitting as a Committee composed of:

Georgios A. Serghides, *President,*
Anja Seibert-Fohr,
Peeter Roosma, *judges,*
and Olga Chernishova, *Deputy Section Registrar,*

Having regard to:

the application (no. 10829/11) 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") on 15 February 2011 by a Russian national, Mr Omar Shalayevich Magomayev, born in 1954 and living in Makhachkala ("the applicant") who was represented by Mr D.S. Itslayev, a lawyer practising in Grozny;

the decision to give notice of the application to the Russian Government ("the Government"), represented by Mr A. Fedorov and Mr M. Galperin, former Representatives of the Russian Federation to the European Court of Human Rights, and later by their successor in this office, Mr M. Vinogradov;

the decision to reject the Government' s objection to examination of the application by the Committee;

the parties' observations;

Having deliberated in private on 5 July 2022,

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

SUBJECT-MATTER OF THE CASE

1. The applicant is the father of Mr G.M. The case concerns the death of the applicant's son as a result of a special operation carried out by State agents.

2. According to the Government (who have not provided relevant documents), at some point the Federal Security Service of the Republic of Dagestan ("the FSB") and officers of the Ministry of Interior of the Republic of Dagestan ("the UVD officers") acquired information on alleged involvement of G.M. and his acquaintance K.A. in an illegal armed group and preparation of attacks on law enforcement officers. On 11 January 2010 the UVD officers obtained information on G.M.'s and K.A.'s whereabouts and decided to arrest them.

3. According to the eyewitnesses' statements submitted by the applicant, on 10 January 2010 and on the morning of the next day several masked men in a Gazel vehicle inspected houses in a crowded Irchi Kazaka street in Makhachkala.

I. THE EVENTS OF 11 JANUARY 2010

4. According to the Government, on 11 January 2010 at about 2 p.m. the UVD and the FSB officers attempted to apprehend G.M. and K.A., who were driving in a car in the centre of Makhachkala. G.M. and K.A. disobeyed the officers' order to stop the car, opened fire "using firearm of unspecified type", and K.A. attempted to throw a hand grenade. The officers (none of whom were harmed) fired at them in defence and killed G.M. and K.A.

5. According to the applicant (who provided detailed statements of seven witnesses including eyewitnesses of the fatal shooting, as well as photographs of the scene), when G.M. and K.A, unarmed, were approaching K.A.'s car parked in Irchi Kazaka street that day, unspecified officers blocked the road. G.M. (who remained in the street) and K.A. (who entered the car) came under intense fire from three masked men in plain clothes – as subsequently established, law enforcement officers, – who had been waiting for them in an ambush. Without giving any warning, the men fired three shots from unspecified firearms. Then the above-mentioned Gazel vehicle arrived and blocked the road. Witnesses heard automatic gunfire. Those shots were fired by men standing near the vehicle. G.M. and K.A. were killed on the spot. Several bullets hit the car (as further confirmed by the ballistics experts). G.M.'s body was lying on the ground, as he had not got in the car. Immediately after the shooting, the masked men moved G.M.'s body and searched for firearms but did not find any on him. The officers allegedly planted firearms and ammunition at the scene, to imitate a shootout.

II. CRIMINAL CASE AGAINST G.M. AND K.A.

6. On the same date the authorities opened criminal proceedings against G.M. and K.A. on suspicion of encroachment on the officers' lives and illegal arms possession.

7. During an on-site inspection a pistol was found lying on the sidewalk next to G.M.'s body, as well as three hand grenades, including one in the applicant's pocket. According to a forensic explosives report, the gunshot residue was found on swabs taken from G.M.'s hands. The biological forensic report of 6 May 2010 did not exclude that the traces of sweat discovered on the seized firearms could belong to G.M. and K.A.

8. According to the Government, firearms and ammunition were found during searches in G.M.'s and K.A.'s homes on unspecified dates. They did not submit copies of the search records or other relevant documents.

9. Multiple bullet wounds were found on G.M.'s body, including at sternum area.

10. The investigators questioned several witnesses who had been in the vicinity of the scene, heard the gunshots but had not seen the events unfolding; as well as relatives of G.M. and K.A., including the applicant.

11. It does not appear that the authorities questioned other witnesses, including, in particular, the officers carrying out the operation, or established those officers' identities.

12. The applicant did not have access to the criminal case file.

13. Several times the proceedings against G.M. and K.A. were discontinued due to their death and resumed by a higher investigating authority, since the investigation was incomplete. On 23 March 2011 the proceedings against G.M. and K.A. were discontinued on the same grounds.

III. THE APPLICANT'S ATTEMPTS TO INITIATE AN INVESTIGATION INTO HIS SON'S DEATH

14. The applicant and his lawyer on several occasions requested the investigative authorities to open a criminal case into the killing of G.M. and K.A.; to grant the applicant and other relatives victim status; to provide information and records of investigative actions; and to question eyewitnesses and the officers carrying out the operation. Those requests were dismissed or left unanswered.

15. On 9 July 2010 the Sovetskiy District Court of Makhachkala dismissed the applicant's complaint about the investigators' inaction (as upheld on appeal on 16 August 2010 by the Supreme Court of the Republic of Dagestan). The courts upheld the investigator's decision that, in view of the ongoing criminal proceedings against G.M. and A.K., it was not appropriate, at that stage, to open proceedings into their killing, and to grant victim status to the relatives. The courts confirmed that the identities of the officers involved in the operation could not be revealed as that was confidential information in terms of the Suppression of Terrorism Act, and therefore they could not be questioned. The courts upheld the refusal of the request for access to the criminal case-file material as lawful.

16. The applicant complained under Articles 2 and 13 of the Convention that the authorities had intentionally killed his son covering the whole operation as a shootout, and that the authorities failed to investigate his son's death.

THE COURT'S ASSESSMENT

17. The applicant's complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. They must therefore be declared admissible.

18. Relevant general principles are summarised in *Dalakov v. Russia* (no. 35152/09, §§ 61-65, 16 February 2016).

19. It is common ground between the parties that the death of the applicant's son G.M. resulted from the use of lethal force by State agents.

I. PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION

20. The Court notes at the outset that no criminal investigation into G.M.'s death was carried out. The investigation opened against G.M. and A.K. (see paragraph 6 above) was not aimed at establishing the events leading to the use of lethal force against G.M. That investigation failed to reconstruct the chain of those events or identify or question the witnesses of the events.

21. In particular, the officers involved in the operation had never been identified and questioned (see paragraphs 11 and 15 above) Likewise, no eyewitnesses of the incident had been identified and questioned, even though the events had occurred in a crowded area (see paragraphs 5 and 10 above). Nor did the investigation address the issue whether the use of force had been justified.

22. Given that no testimonies had been obtained, it is unclear how the State authorities came up with the official version of events (see paragraph 4 above) and on what evidence it was based. The discrepancies between their account and the evidence in the case had never been properly addressed. For example, the case file contained no explanations why the body of G.M. had been found on the ground, while, according to the official account, G.M. and K.A. had been shot when driving the car (see paragraphs 4, 5 and 7 above).

23. Therefore, the domestic authorities had failed to demonstrate a proper response to the serious allegations of inappropriate use of lethal force by State officials. The investigation was incapable of ascertaining the circumstances of the fatal shooting and of leading to a determination of whether the force used was justified in the circumstances and to the identification and punishment of those responsible for an unlawful killing. It also cannot be said that the authorities have taken the reasonable steps to secure the evidence concerning the incident, including eyewitness testimony (see *Dalakov*, cited above, § 65).

24. The applicant was not accorded the status of victim in these proceedings and was denied access to the case materials (see paragraph 12 above). His requests to have a separate investigation into the killing have been dismissed (see paragraph 15 above).

25. Accordingly, there has been a violation of Article 2 of the Convention under its procedural limb.

II. RESPONSIBILITY OF THE STATE FOR THE DEATH OF G.M.

26. The parties disagreed on whether the use of lethal force against the applicant's son was "absolutely necessary", as well as on the exact circumstances of this operation.

27. The Court's ability to evaluate the operation has been seriously hampered by the lack of any meaningful investigation into the State officials'

conduct (see paragraphs 20-21 above). In the present case, the Court has no sufficient evidence which would enable it to confirm "beyond reasonable doubt" the applicant's account of events. At the same time, the Government's account is not fully consistent with the available evidence and, insofar as the course of the events concerned, contains numerous omissions and ambiguities (see paragraphs 20-22 above).

28. It is not in dispute that the operation had not been spontaneous, but had been planned in advance with at least some prior knowledge about G.M.'s profile and activities (see paragraphs 2 - 3 above). The officers should have been therefore under an obligation to envisage different scenarios of an apprehension operation and to minimise the risk of the use of lethal force (see *Dalakov*, cited above, § 81). However, the Government did not provide any details in respect of the planning stage of the operation to suggest that any preparations had been made in this connection.

29. The number and the character of wounds on G.M.'s body, as well as multiple bullet traces on the car (see paragraphs 5 and 9 above), in the Court's view, raise doubts as to whether the officers had intended to apprehend the two men, and had not shot to kill (see *Mansuroğlu v. Turkey*, no. 43443/98, §§ 86-87, 26 February 2008).

30. In the absence of information on the crucial elements concerning the events, as well as any domestic assessment whether the use of force by the officers against G.M. and K.A. had been "absolutely necessary" and not excessive, the Government may not be regarded as having accounted for the use of lethal force in the circumstances of the present case. The Court is therefore not persuaded that the killing of G.M. constituted a use of force which was no more than absolutely necessary in pursuit of the aims provided for in Article 2 § 2 of the Convention (see *Dalakov*, cited above, § 85, and *Makaratzis v. Greece* [GC], no. 50385/99, § 67, ECHR 2004-XI).

31. There has accordingly been a violation of the substantive aspect of Article 2 of the Convention.

III. ARTICLE 13 OF THE CONVENTION

32. Having regard to its findings in paragraphs 20-25 above, the Court considers that there is no need to give a separate ruling on the merits of the complaint under Article 13 of the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. The applicant claimed 33,756 euros (EUR) in compensation for pecuniary damage caused by the loss of financial support from his son and EUR 200,000 in respect of non-pecuniary damage. The applicant claimed EUR 4,387 in respect of the costs and expenses incurred before the Court. He asked for the award in respect of costs and expenses to be made into the bank account of his representative.

34. The Government contested those claims.

35. The Court recalls that it may, where appropriate, grant pecuniary compensation in respect of loss of material support to close relatives of the deceased (see *Imakayeva v. Russia*, no. 7615/02, § 213, ECHR 2006-XIII (extracts)). The Court awards the applicant EUR 10,000 in respect of pecuniary damage, plus any tax that may be chargeable.

36. The Court further awards the applicant EUR 60,000 in respect of non-pecuniary damage, plus any tax that may be chargeable, and rejects the remainder of the claims.

37. Finally, having regard to the documents in its possession and to its case-law, the Court considers it reasonable to award EUR 3,000, plus any tax that may be chargeable to the applicant, in respect of costs and expenses. The award under this head is to be made directly into the applicant's representative's bank account as indicated by the applicant.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 2 of the Convention under its substantive and procedural limbs;

3. *Holds* that there is no need to examine the merits of the complaint under Article 13 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of pecuniary damage;
      (ii) EUR 60,000 (sixty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (iii) EUR 3,000 (three thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be paid into the representative's bank account;

(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;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 26 July 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Olga Chernishova
Deputy Registrar

Georgios A. Serghides
President