

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

THIRD SECTION

CASE OF YEMKUZHEVA v. RUSSIA

(Application no. 71998/13)

JUDGMENT

STRASBOURG

6 July 2021

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



In the case of Yemkuzheva v. Russia,

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

Darian Pavli, *President,*
Dmitry Dedov,
Peeter Roosma, *judges,*
and Olga Chernishova, *Deputy Section Registrar,*

Having regard to:

the application (no. 71998/13) 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 Khayshat Betalovna Yemkuzheva ("the applicant"), on 21 October 2013;

the decision to give notice to the Russian Government ("the Government") of the case;

the parties' observations;

Having deliberated in private on 15 June 2021,

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

INTRODUCTION

1. The present case concerns the death of the applicant's son during an attempt to apprehend him and the failure to conduct an appropriate investigation into the events.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

2. The applicant was born in 1952 and lives in Nalchik. The applicant was represented by the Stichting Russian Justice Initiative in partnership with the Russian Justice Initiative and Legal Assistance – Astreya.

3. The Government were represented by their Agent, Mr M. Galperin, Representative of the Russian Federation at the European Court of Human Rights, and then by his successor in that office, Mr A. Fedorov.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. The applicant's son, Mr Y., was born in 1987 and resided in Nalchik. In 2007-2008 he travelled to Syria, Lebanon and Turkey to pursue Islamic studies.

A. The events of 16 March 2011

1. Background information provided by the Government

6. The Government submitted that the Federal Security Service of the Republic of Kabardino-Balkaria ("the FSB") had conducted the operational search activities in respect of Mr Y. on suspicion of his involvement in international terrorism, having committed serious crimes, including illegal arms possession. The attempt to apprehend the applicant's son was carried out by trained explosives experts and officers of the FSB, who were allowed to use firearms and special equipment.

2. Operation of 16 March 2011

7. On 16 March 2011 at around 00.10 am the mentioned officers tried to apprehend Mr Y. near garages on the Tolstoy street in Nalchik. He apparently was found to be in possession of a large sports bag.

8. According to the Government, Mr Y. disobeyed the order to raise his hands and fired at an officer. Other officers fired at Mr Y. in defence of their colleague. As a result, Mr Y. was killed. No officers were harmed.

9. The applicant submitted that at around 5 pm on 15 March 2011 her son had left home and never came back. On 16 March 2011 she received a call from her relatives who told her that there had been reports on media about a special operation conducted by the FSB which resulted in the death of her son, who allegedly had resisted the arrest.

B. Subsequent proceedings

1. Criminal case against Mr Y. no. 71/57-11

10. On the same day the authorities brought criminal investigation against the applicant's son. He was accused of having resisted the arrest and attacked the policemen as well as of illegal arms possession, since the applicant's son was found to have been carrying a shotgun, a number of cartridges and grenades.

11. An on-site inspection and multiple forensic expert examinations, including the examination of Mr Y.'s body and clothes, ballistic and blast tests were carried out. Statements were obtained from officer X. who had been standing twenty metres away from Mr Y. when the latter opened fire and from Mr Y.'s relatives.

12. It does not appear from the case file that the authorities questioned any other witnesses, notably the other officers present at the scene.

13. According to the forensic medical examination of Mr Y.'s body of 16 March 2011, the applicant's son died of multiple bullet wounds to the head, thorax and upper limbs. He also had eye bruises and upper-limb

abrasions. It was also established that he had been hit with bullets thirteen times. The report also mentioned an abrasion on the wrists.

14. On 3 June 2011 officer X. testified that he was unaware of the exact number of the special unit officers involved in that operation as well as of the type of the arms used. He saw three masked officers dressed in black. Furthermore, officer X. gave contradictory statements about the date of the event.

15. The applicant did not have the victim status in the criminal proceedings against her son and was unable to have access to the case file.

16. On 31 December 2011 the criminal case against the applicant's son was closed due to his death. The applicant's objections to have more detailed examination of the circumstances of her son's death were not taken into account.

17. On 24 September 2012 the applicant challenged this decision before the Nalchik City Court. It appears that the challenge remained without examination, as on 3 October 2012 the Investigative Committee of the Republic of Kabardino-Balkaria had decided that the investigation was incomplete and reopened the proceedings.

18. The investigator was requested to establish where Mr Y. had been and with whom he had been in contact on 15 and 16 March 2011. It does not appear from the case file that the investigator questioned additional witnesses and established Mr Y.'s whereabouts prior to his death.

19. On 8 November 2012 the criminal case was closed again essentially with the same reasoning as previously.

20. It is not clear whether the applicant was notified of this decision and if she could appeal against it.

2. Preliminary investigation in respect of the circumstances of Mr Y.'s death

21. In parallel to the above-mentioned criminal case, the applicant also tried to initiate separate proceedings in respect of her son's death.

22. On 17 March 2011 the applicant's son's body was returned to the family. They noted that the body carried not only traces of bullet impacts, but also clear traces of handcuffs on his wrists, burns and a broken nose.

23. From 22 March to 24 May 2011 the applicant tried to initiate a criminal investigation into the circumstances of her son's death and to explain the origin of the mentioned injuries. In response, she received letters from the authorities promising to address these issues during the investigation.

24. On 20 October 2011 preliminary investigation (case no. 1587-11) was initiated against unknown law enforcement officers, upon the applicant's complaint. The relevant decision pointed at the need to examine whether the traces on the body could have resulted from the use of handcuffs.

25. On 2 August 2011 an additional forensic expert examination of Mr Y.'s body was conducted. Among other things, the expert mentioned the abrasions on the wrists which "could be due to handcuffing" or result from "the impact of hard and blunt objects dating to up to one day prior to death". The applicant's other allegations regarding burns and a broken nose remained unconfirmed.

26. On 30 October 2011 the investigator refused to open the criminal case for the lack of indication of a crime.

27. On 24 September 2012 the applicant appealed this decision (see also paragraph 17 above). On 11 January 2013 the Nalchik City Court found it unlawful on account of the investigator's failure duly to investigate the origin of all injuries and to give detailed reasons for the refusal. On 26 February 2013 the Supreme Court of the Republic of Kabardino-Balkaria upheld the above first-instance decision.

28. On 14 June 2013 the investigator refused again to open the criminal case on the same grounds as previously. It does not appear that the investigator examined the origins of all Mr Y.'s injuries. They also did not address the circumstances of the operation.

II. RELEVANT DOMESTIC LAW

29. For a summary of relevant law and practice, see *Dalakov v. Russia* (no. 35152/09, §§ 51-53, 16 February 2016).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

30. The applicant complained under Article 2 of the Convention that her son, Mr Y., had been killed. She also alleged that the authorities had failed to conduct an effective investigation into the matter. Article 2 of the Convention reads as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

A. Admissibility

1. The parties' observations

31. The Government argued that the applicant had failed to exhaust domestic remedies. In particular, in her complaints she had not claimed that the conducted investigation was ineffective or that the authorities had failed to establish the circumstances of the operation resulting in her son's death, but only sought access to the criminal case.

32. The Government also alleged that the applicant had failed to appeal the latest investigator's decision to terminate the case before the national courts (see paragraphs 19-20 above). The Government further submitted that the applicant had failed to comply with the six-months requirement, as she had lodged the application more than nine months after the date on which the applicant had become aware of the decision of 8 November 2012.

33. The applicant disagreed and argued that the criminal investigation had proved to be ineffective and that her complaints had been futile.

34. Furthermore, the applicant deplored the lack of victim status in the criminal proceedings against her son (see paragraph 15 above). On several occasions, she had requested access to the case file, but to no avail. In the absence of access to the file, she could not timely challenge the effectiveness of both sets of proceedings.

2. The Court's assessment

35. The Court considers that the question of whether the applicant exhausted domestic remedies in respect of this complaint is closely linked to the question of whether the domestic authorities carried out an effective investigation into her allegations. These issues relate to the merits of the applicant's complaint under Article 2 of the Convention. The Court therefore decides to join them to the merits, which are to be examined below (see paragraph 45 below).

36. As regards the Government's argument that the applicant's complaints were belated, the Court notes that nothing in the case file enables it to consider the decision of 8 November 2012 as either the final or the latest decision taken by the investigation regarding the circumstances of Mr Y.'s death. It observes that that various proceedings were pending at least until 14 June 2013, when the investigator again refused to open the criminal case in reply to the applicant's complaints (see paragraph 28 above). This being so, the applicant did not fail to comply with the six months rule regarding her complaints about the quality of investigation of the circumstances of her son's death. The Government's objection should therefore be dismissed.

37. The Court notes that the applicant's complaints are not manifestly ill-founded with meaning of Article 35 § 3 (a) of the Convention. It further

notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' observations

38. The applicant insisted that the authorities had apprehended her son, tortured and questioned him and then murdered him covering the whole operation as a shootout, whilst the Government maintained that Mr Y. had been shot as a result of the officers returning fire and considered that the use of lethal force against Mr Y. had been justified, as the officers had merely returned fire, thus acting in self-defence.

2. The Court's assessment

39. The applicable general principles have been summarised by the Court in *Dalakov v. Russia*, cited above, §§ 61-65.

40. It is common ground between the parties that the death of the applicant's son Mr Y. resulted from the use of lethal force by State agents (see paragraph 8 above). The Court will firstly assess the adequacy of the investigation into the surrounding circumstances and will then turn to the assessment of the actions of the State agents.

(a) The State's procedural obligation under Article 2 of the Convention

41. The Court notes firstly that on the day of the events criminal investigation was opened against Mr Y. on suspicion of the attack upon police and illegal arms possession (see paragraphs 10-16 above). Its focus was not aimed at the reconstruction of the events leading to the application of lethal force. This set of investigation did not establish the key elements of the incident, the person at whom Mr Y. had allegedly fired or identify or question the key witnesses of the events (see paragraphs 11-13, 18 and 26 above).

42. The Court notes, in particular, that a number of law-enforcement agents were involved in the operation. At the same time, it is not in dispute that not all officers involved in the special operation were identified, let alone questioned. The officers who had fired at the applicant's son remained unidentified and never gave evidence (see paragraphs 11-12 and 18 above). Only officer X. was questioned, and made vague and contradictory statements which remained largely unverified (see paragraphs 11 and 14 above).

43. In addition, the contradictions between the official version of the events and the injuries found on Mr Y.'s body, in particular, the abrasions on the wrists (see paragraphs 22 and 25 above) were never properly resolved. As a result of these shortcomings, the investigators failed to

reconstruct the chain of events leading to the application of lethal force and to establish the key elements of the incident.

44. In the light of the above, the Court concludes that the domestic authorities had failed to demonstrate a proper response to the serious allegations of inappropriate use of lethal force by agents of the State. The investigation was not effective in the sense that it was incapable of ascertaining the circumstances in which the incident had taken place and of leading to a determination of whether the force used was or was not 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 and forensic evidence (see *Dalakov*, cited above, with further reference).

45. The Court further notes that the applicant's access to both sets of investigation, i.e. the one opened into the actions of Mr Y. and the one concerning the circumstances of his death, has been hampered by a number of procedural setbacks and lack of information. Nevertheless, the applicant has on multiple occasions challenged the authorities' lack of action in respect of this investigation (see paragraphs 15-20 and 27-28 above). In these circumstances, the Court is satisfied that the authorities were made sufficiently aware of the applicant's persistent wish to investigate properly the death of her son and to participate in the relevant proceedings. It considers that the Government's objection about the applicant's alleged failure to exhaust should therefore be dismissed.

46. Accordingly, the Court concludes that there has been a violation of Article 2 of the Convention under its procedural head.

(b) Responsibility of the State for the death of Mr Y.

47. The Court notes that Mr Y. was killed on 16 March 2011 as a result of the special operation carried out by the State agents. The parties disagreed on whether the use of lethal force against him was "absolutely necessary", as well as on the exact circumstances of this operation.

48. The applicant insisted that the authorities had apprehended her son, tortured and questioned him and then murdered him covering the whole operation as a shootout, whilst the Government maintained that Mr Y. had been shot as a result of the officers returning fire.

49. The Court recalls that in assessing evidence it has generally applied the standard of proof "beyond reasonable doubt" (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25). However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons under their control in custody, strong presumptions of fact will arise in respect of injuries or death occurring

during that detention (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII, and *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 181, 24 March 2011).

50. In the present case, the Court has no sufficient evidence which would enable it to confirm "beyond reasonable doubt" the applicant's allegations of Mr Y.'s alleged execution. At the same time, the Government's version is also not fully consistent with the case-file materials and, insofar as the course of the events in concerned, contains numerous omissions and ambiguities. In the Court's view, 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 Mr Y.'s profile and activities (see paragraph 6 above). The officers should have been therefore well-equipped to deal with different scenarios for the arrest operation and were under an obligation to minimise the risk of the use of lethal force (see *Akhmadov and Others v. Russia*, no. 21586/02, § 101, 14 November 2008).

51. The Court further observes that there is nothing in the documents reviewed by the Court to suggest that any serious consideration was devoted at the planning stage of the operation to the possibility that Mr Y. might try to escape or return fire (see *Yukhymovych v. Ukraine*, no. 11464/12, §§ 76-79, 17 December 2020; *Dalakov*, cited above, § 83; and *Tsoroyev v. Russia* [Committee], no. 13363/11, § 51, 24 March 2020). The Government failed to provide any planning details in this connection. Indeed, the perfunctory information available to the Court regarding the incident and in particular the number and the character of wounds on Mr Y.'s body (see paragraph 13 above) appear to suggest that the officers had aimed at Mr Y.'s vital organs clearly shooting to kill (see *Mansuroğlu v. Turkey*, no. 43443/98, §§ 86-87, 26 February 2008). The Court finds that in the absence of information on the crucial elements concerning the events the Government may not be regarded as having accounted for the use of lethal force in the circumstances of the present case. It is therefore not persuaded that the killing of Mr Y. constituted a use of force which was no more than absolutely necessary in pursuit of the aims provided for in paragraph 2 of Article 2 of the Convention (see *Dalakov*, cited above, § 85; *Makaratzis v. Greece* [GC], no. 50385/99, § 67, ECHR 2004-XI).

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

II. ALLEGED VIOLATION OF ARTICLES 3 AND 5 OF THE CONVENTION

53. Relying on Articles 3 and 5 of the Convention, the applicant complained that before murdering her son the authorities had apprehended, tortured and questioned her son. Articles 3 and 5 the Convention read as follows:

Article 3

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

Article 5

"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 ..."

A. The parties' submissions

54. The Government denied the applicant's allegations as implausible and unconfirmed. As regards the abrasions found on Mr Y.'s wrists, they considered them minor and not reaching the level of severity under Article 3 of the Convention.

55. The applicant maintained her complaints.

B. The Court's assessment

56. The Court observes that it has not found it established "beyond reasonable doubt" that Mr Y. was executed (see paragraph 50 above). Likewise, there is nothing in the case-file to confirm that he was apprehended, ill-treated or detained by law enforcement officers, as alleged by the applicant. The expert did not confirm the presence of the alleged burns on Mr Y.'s body and found that face bruises had been caused by bullet wounds (see paragraph 25 above). The presence of scratches on Mr Y.'s arms could, as alleged by the applicant, indicate the use of handcuffs, but could also be due to other circumstances completely unrelated to the events at issue and possibly predating them (*ibid*).

57. The Court therefore considers that this part of the application should be dismissed as being manifestly ill-founded and must be declared inadmissible in accordance with Article 35 §§ 3 and 4 of the Convention (for similar conclusions, see *Gadayev and Others v. Russia*, no. 51119/15, § 72, 14 January 2020).

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

58. The applicant complained that there had been no effective remedies in respect of the alleged violations of Articles 2 and 3 of the Convention. Article 13 of the Convention reads:

> "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."

59. The Court observes that this complaint concerns the same issues as those examined above in paragraphs 41-46 under the procedural limb of Article 2 of the Convention. Therefore, the complaint should be declared admissible. However, having regard to its conclusion under Article 2 of the Convention, the Court considers it unnecessary to examine those issues separately under Article 13 of the Convention (see *Fanziyeva v. Russia*, no. 41675/08, § 85, 18 June 2015, and *Dalakov*, cited above, § 90).

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

60. Insofar the applicant complained under Article 3 of the Convention about the general level of stress and suffering during the proceedings in the case, the Court considers that, in the light of all the material in its possession and in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols other than those examined above. Accordingly, these complaints must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

61. Article 41 of the Convention provides:

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

A. Damage

62. The applicant claimed 1,628,334 Russian roubles (RUB) (18,319 euros (EUR)) in compensation for pecuniary damage caused by the loss of financial support from her son, who had been the breadwinner of her family. The applicant submitted she could have counted on at least 30% of his earnings. She also claimed just satisfaction in respect of non-pecuniary damage in an amount to be determined by the Court.

63. The Government disagreed and considered these claims unfounded and excessive.

64. In respect of the claims for pecuniary damage, the Court reiterates that there must be a clear causal connection between the damages claimed by the applicants and the violation of the Convention. This may, where appropriate, include compensation for loss of earnings, which applies to close relatives, including spouses, elderly parents and minor children (see,

among other authorities, *Imakayeva v. Russia*, no. 7615/02, § 213, ECHR 2006-XIII (extracts)).

65. In the light of the foregoing conclusions, the principles enumerated above and the parties' submissions, the Court awards the applicant EUR 10,000 in respect of pecuniary damage, plus any tax that may be chargeable to them on this amount.

66. As regards the claims for non-pecuniary damage, the Court reiterates that whenever it finds a violation of the Convention, it may accept that the applicant has suffered non-pecuniary damage that cannot be compensated for solely by the finding of a violation and make a financial award. Having regard to the principle set out above, the parties' submissions and the violation found, the Court awards the applicant EUR 60,000, plus any tax that may be chargeable to her on that amount.

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

B. Costs and expenses

68. The applicant also claimed EUR 4,659.38 for the costs and expenses incurred before the domestic authorities and the Court. She asked for the award to be transferred into the bank account of her representative.

69. The Government regarded this claim unfounded.

70. Regard being had to the documents in its possession and to its case-law, the Court considers it reasonable to award the sum of EUR 3,000, plus any tax that may be chargeable, covering costs and expenses under all heads. The award is to be transferred into the applicant's current representative's bank account in the Netherlands as indicated by the applicant.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints about the killing of Mr Y. by State agents and the authorities' failure properly to investigate the circumstances of his death admissible and the remainder of application inadmissible;

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 complaint under Article 13 of the Convention in respect of the alleged violations of Article 2 of the Convention;

4. *Holds*

(a) that 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 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;

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

Done in English, and notified in writing on 6 July 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Olga Chernishova	Darian Pavli
Deputy Registrar	President