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

FIRST SECTION

CASE OF ZAURBEKOVA AND ZAURBEKOVA v. RUSSIA

(Application no. 27183/03)

JUDGMENT

This version was rectified on 12 March 2009
under Rule 81 of the Rules of Court

STRASBOURG

22 January 2009

FINAL

05/06/2009

This judgment may be subject to editorial revision.

In the case of Zaurbekova and Zaurbekova v. Russia,

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

Christos Rozakis, *President,*
Nina Vajić,
Anatoly Kovler,
Elisabeth Steiner,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni, *judges,*
and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 16 December 2008,

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

PROCEDURE

1. The case originated in an application (no. 27183/03) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Russian nationals, Ms Tumisha Magomedovna Zaurbekova and Ms Maryam Dushayevna Zaurbekova ("the applicants"), on 18 July 2003.

2. The applicants, who had been granted legal aid, were represented by lawyers of the Stichting Russian Justice Initiative ("the SRJI"), an NGO based in the Netherlands with a representative office in Russia. The Russian Government ("the Government") were represented first by Mr P. Laptev and then by Ms V. Milinchuk, both former Representatives of the Russian Federation at the European Court of Human Rights.

3. The applicants alleged, in particular, that their close relative had disappeared following his unacknowledged detention and that there had been no adequate investigation into the matter. They further complained of their mental suffering on account of these events. The second applicant also complained of a violation of the right to respect for home and property rights in respect of herself and her missing relative. Lastly, the applicants complained of the lack of effective remedies in respect of those violations. They relied on Articles 2, 3, 5, 8 and 13 of the Convention and Article 1 of Protocol No. 1.

4. On 29 August 2004 the President of the First Section decided to grant priority to the application under Rule 41 of the Rules of Court.

5. By a decision of 11 October 2007 the Court declared the application partly admissible.

6. The applicants and the Government each filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicants were born in 1943 and 1975 respectively and live in Urus-Martan.

A. The facts

8. The first applicant has two children: Isa Zaurbekov, born in 1967, and the second applicant. At the material time her two children were living temporarily in a block of flats at 1 Kirov Avenue in Grozny, Chechnya. Isa Zaurbekov worked as a car mechanic in a local repair shop.

1. Detention of Isa Zaurbekov

(a) The applicants' account

9. On 11 February 2003, at around 3 a.m., a group of armed men forcibly entered the block of flats at 1 Kirov Avenue and attempted to break down the door of a flat in which the second applicant and Isa Zaurbekov lived. The men managed to make a hole in the door. One of them then pointed his sniper rifle (*vintorez*) through the hole at the second applicant, who had been awakened by the noise, and ordered her to let them in. As soon as the second applicant opened the door, the men pushed her aside and about 15 of them entered the flat. They were wearing camouflage uniforms and one of them was masked. The men had sniper rifles with optic sights and silencers. According to the second applicant, the men who raided her flat belonged to the Russian federal troops, since they spoke Russian without an accent, had a Slavic appearance, were equipped with military vehicles and were able to circulate freely in Grozny during the curfew.

10. One of the men ordered another one to get the second applicant "out of the way", and the latter put his gun into her mouth. Then he covered the second applicant's mouth with a rag and tied her hands with a rope.

11. The intruders did not introduce themselves or produce any documents to authorise their actions and searched the flat. They forced Isa Zaurbekov, who was asleep in his room, out of bed and ordered him to lie down. The men tied his hands and covered his mouth with adhesive tape. They then ordered the second applicant's brother to produce his identity

papers, and the latter indicated that his passport was in his jacket. One of the servicemen showed Isa Zaurbekov's passport to the masked man and asked if that was him. The masked man shook his head in the negative. The former servicemen stated that they would "take [Isa Zaurbekov] away anyway and then find out". Although Isa Zaurbekov was only wearing trousers and a shirt and was barefoot, the men did not allow him to take his overcoat.

12. Before leaving the flat one of the men ordered the second applicant to stay immobile for half an hour if she "wanted to live". However, the one who had tied her up told her quietly that he had made the knot loose so that she could free herself easily. After the men had left, the second applicant managed to untie her hands. She then went out on the balcony and saw about 40 servicemen in the street. There were also three armoured personnel carriers ("APCs"), a white VAZ-2106 Zhiguli car and a UAZ vehicle. They left in the direction of the federal military base in Khankala. The applicants have had no news of Isa Zaurbekov since that date. The second applicant also examined the flat and found out that a computer central processing unit, a number of compact discs and a family photo album were missing.

13. The applicants corroborated their account of events of 11 February 2003 with two eyewitness statements, notably those of Ms M.-M. and Ms D., the second applicant's neighbours. Both women confirmed that on the night of the incident they had seen a group of about 40 men in camouflage uniforms and masks armed with machine guns and that those men had taken away Isa Zaurbekov. Ms M.-M. stated that she had also seen, and Ms D. stated that she had heard the noise of, military vehicles.

(b) The Government's account

14. In the Government's submission, on 11 February 2003, at around 3 a.m., "unidentified persons in camouflage uniforms armed with automatic firearms" had taken Isa Zaurbekov away in an unknown direction from flat no. 49 of the block of flats at 1 Kirov Street. The same persons had "committed a theft" of the Zaurbekovs' property, notably a computer central processing unit, compact discs and a family photo album.

2. The applicants' search for Isa Zaurbekov

15. According to the applicants, on 12 February 2003 they complained in writing about their relative's detention to the Khankala military prosecutor but received no reply. The applicants did not furnish the Court with a copy of their complaint.

16. Following Isa Zaurbekov's detention, the applicants repeatedly applied in person and in writing to various public bodies, including prosecutors at various levels, administrative authorities of Chechnya, the Office of the President of Russia (*Администрация Президента РФ*), the Chairman of the State Duma (*Председатель Государственной Думы*) and the Plenipotentiary Representative of the Russian President in the Southern

Federal Circuit (*Полномочный представитель Президента РФ в Южном федеральном округе*). They were supported in their efforts by the SRJI. In their letters to the authorities the applicants and the SRJI referred to the events of 11 February 2003 and asked for assistance and details of the investigation. Mostly these enquiries remained unanswered, or only formal responses were given stating that the applicants' requests had been forwarded to various prosecutor's offices for examination.

3. Official investigation

17. In their observations submitted prior to the decision on admissibility, the Government stated that the applicants had first notified the authorities of their relative's detention on 14 April 2003, when the second applicant's complaint about the events of 11 February 2003 had been received by the Grozny prosecutor's office (*прокуратура г. Грозного*). In the Government's submission, on 25 April 2003 the Grozny prosecutor's office forwarded this complaint "for examination" to the office of the interior of the Leninskiy District of Grozny (*Ленинский отдел внутренних дел г. Грозного*). The latter sent the documents on the result of the examination to the Grozny prosecutor's office on 23 May 2003. The Government also submitted that on 17 June 2003 the Grozny prosecutor's office had instituted a criminal investigation into Isa Zaurbekov's disappearance under Article 126 (2) of the Russian Criminal Code (aggravated kidnapping) and that the file had been registered as no. 20123.

18. In their observation submitted after the present case had been declared partly admissible, the Government stated that the criminal proceedings in connection with the abduction of the applicants' relative had been instituted upon a written complaint by the second applicant, received by the Grozny prosecutor's office on 19 June 2003. The Government did not indicate the date on which, according to them, the criminal proceedings had been instituted.

19. The file on the present case contains a written complaint concerning Isa Zaurbekov's abduction, signed by the second applicant and dated 9 March 2003. The document bears a handwritten note "received" – the form of the verb "receive" indicating that this action was performed by a woman – and the date "14 April 2003".

20. In letters of 25 and 30 June 2003 the prosecutor's office of the Chechen Republic (*прокуратура Чеченской Республики,* "the republican prosecutor's office") informed the first applicant that criminal proceedings had been brought in connection with her son's abduction by unidentified persons and that she would be notified of the results of the investigation.

21. By a letter of 23 July 2003 the military prosecutor of the United Group Alignment (*военный прокурор Объединенной группы войск*) transmitted the first applicant's application to the military prosecutor of

military unit no. 20102 (*военный прокурор войсковой части 20102*) for examination.

22. On 31 July 2003 a deputy Prosecutor General of Russia (*заместитель Генерального прокурора РФ*) informed the first applicant that he had forwarded her request to establish the whereabouts of her son, who had been detained by "individuals wearing military uniforms", to the republican prosecutor's office, which would notify her of any developments in the case.

23. In a decision of 11 August 2003 an investigator of the prosecutor's office of the Leninskiy District of Grozny (*прокуратура Ленинского района г. Грозного* – "the district prosecutor's office") acknowledged the first applicant as a victim in criminal case no. 20123.

24. In a letter of 25 August 2003 the republican prosecutor's office again informed the first applicant that criminal case no. 20123 had been opened in connection with Isa Zaurbekov's abduction and that the term for a preliminary investigation had been extended until 17 September 2003. The letter added that investigative measures were being taken to identify the alleged perpetrators and that the republican prosecutor's office was closely supervising the investigation.

25. On 25 September 2003, in reply to the second applicant's application of 15 March 2003, the Grozny prosecutor's office informed her that the preliminary investigation in criminal case no. 20153 [rather than 20123] opened on 17 June 2003 into her brother's disappearance had been suspended on account of the "failure to identify those responsible"; however, "the search for Isa Zaurbekov had not been discontinued".

26. On 29 October 2003, in reply to an application lodged by the SRJI on the applicants' behalf, the republican prosecutor's office stated that the criminal proceedings in case no. 48193 [rather than 20123] instituted on 17 June 2003 in connection with Isa Zaurbekov's abduction by unknown individuals, had been suspended on 17 September 2003, as the alleged perpetrators could not be established. The SRJI and the applicants were advised to address any further queries to the district prosecutor's office.

27. In a letter of 2 December 2003, in reply to another query from the SRJI, the republican prosecutor's office restated that the criminal investigation into Isa Zaurbekov's abduction had been commenced on 17 June 2003.

28. On 11 December 2003 the district prosecutor's office informed the first applicant that all the necessary investigative measures had been taken in the course of the investigation in criminal case no. 20123, but the location of her son had not been established, and that at present the search for Isa Zaurbekov was still in progress.

29. On 11 April 2005 the republican prosecutor's office notified the first applicant, in reply to an enquiry she had made on 25 February 2005, that the

file on the case concerning her son's abduction had been sent to the district prosecutor's office "for the resumption of the investigation".

30. In a decision of 14 April 2005 the district prosecutor's office granted the status of victim of a crime to the second applicant. The applicants submitted a copy of that decision.

31. On the same date the district prosecutor's office informed the first applicant that the proceedings in case no. 20123 had been resumed.

32. On 15 April 2005 the investigator in charge of the district prosecutor's office sent requests to prosecutors of regions neighbouring Chechnya as well as to prosecutors of various districts in Chechnya, describing Isa Zaurbekov's appearance and distinguishing marks and asking them to check whether he was listed among unidentified dead bodies and whether any criminal cases had ever been opened in connection with the discovery of corpses with a similar appearance and distinguishing marks to those of Isa Zaurbekov.

33. On 5 May 2005 the investigator in charge sent a reminder to the district prosecutor's offices of Chechnya, asking them to comply with the request of 15 April 2005, which had remained unanswered.

34. On 14 May 2005 the district prosecutor's office notified the first applicant of the suspension of the investigation on an unspecified date. The letter also stated that measures aimed at establishing the identity of the alleged perpetrators were being taken.

35. By a letter of 10 June 2005 the republican prosecutor's office transmitted the first applicant's query to the district prosecutor's office for examination.

36. On 13 July 2005 the office of the interior of the Urus-Martan District of Grozny informed the first applicant that it was taking steps aimed at establishing Isa Zaurbekov's whereabouts and finding those involved in his abduction.

37. On 11 August 2005 the district prosecutor's office replied to the first applicant's query of 2 August 2005. The letter stated that the investigation in criminal case no. 20123 in connection with her son's abduction had been opened on 17 June 2003, and that although all possible measures had been taken, Isa Zaurbekov's whereabouts and the identity of the alleged perpetrators could not be established. It went on to say that a number of witnesses residing in the same block of flats where Isa Zaurbekov and the second applicant had lived had been questioned and that relevant enquiries had been sent to various State bodies in Chechnya and neighbouring regions; however, those steps had brought no positive results. The letter assured the first applicant that the search for her son was in progress and stated that she could access the file of criminal case no. 20123 at any time during working hours on the premises of the district prosecutor's office.

38. In a letter of 18 August 2005 the republican prosecutor's office informed the applicants that the investigation in case no. 20123 had been reopened.

39. It appears that at some point the investigation was again suspended.

40. In a letter of 28 November 2005 the district prosecutor's office notified the applicants that the investigation in case no. 20123 had been resumed on the same date.

41. On 28 December 2005 the district prosecutor's office informed the applicants of the adjournment of the proceedings in case no. 20123 on account of the failure to identify the alleged perpetrators.

42. Referring to the information provided by the Prosecutor General's Office, the Government stated in their memorials submitted prior to the decision on admissibility that the investigation into Isa Zaurbekov's abduction had been commenced on 17 June 2003 and then suspended on 17 September 2003, 14 May and 17 September 2005 and resumed on 14 April, 17 August and 28 November 2005, but had so far failed to identify those responsible. In their memorial submitted after the decision on admissibility, the Government stated that on the latest occasion the investigation had been suspended on 28 December 2005 and then reopened on 10 November 2007.

43. In the Government's submission, the second applicant was questioned on 10 August and 15 September 2003 and 14 April 2005 and declared a victim of a crime on 4 September 2003. During her witness interview of 10 August 2003 the second applicant reiterated her account of events of 11 February 2003 and, in particular, stated that the men who had taken away her brother had been wearing camouflage uniforms and masks and had had machine guns, sniper rifles and portable transmitters, that there had been around 15 of them in her flat and that she had seen from the balcony of her flat that they had left in three armoured personnel carriers, UAZ vehicles, and a white VAZ 2106 Zhiguli car in the direction of the 6th mini-district of Grozny (*6-й микрорайон г. Грозного*). The men had also taken the central processing unit of a desktop computer, a computer mouse, 10 compact discs and a family photo album. According to the Government, in her interview of 15 September 2003 the second applicant also stated that the reason for the abduction of her brother, Isa Zaurbekov, could have been the fact that their other brother, Kh., had been a member of illegal armed groups. During her interview of 14 April 2005, the second applicant described Isa Zaurbekov's distinguishing marks and the clothes which he had been wearing on the night of his abduction and assessed the value of the stolen computer central processing unit as amounting to 20,000 Russian roubles (RUB).

44. The investigators also questioned the first applicant on 11 August and 19 September 2003 and declared her a victim of a crime on 11 August 2003. She stated that the second applicant had informed her in the early

hours of 12 February 2003 of Isa Zaurbekov's detention and that the following day she had notified all relevant State bodies, but her son's whereabouts had not been established.

45. Apart from the applicants, the authorities also questioned the applicants' relatives and a number of the second applicant's neighbours. As can be ascertained from the Government's submissions, two of the neighbours were questioned in September 2003, and the others in April and December 2005. Most of them stated that they had not witnessed Isa Zaurbekov's abduction or seen any servicemen or military vehicles on the night of the incident, but had heard the next day that Isa Zaurbekov had been taken by servicemen in armoured personnel carriers. One of the neighbours, Mr D., submitted that on the night of the incident he had seen about ten armed men in camouflage uniforms and masks near the block of flats in which he, the second applicant and Isa Zaurbekov had lived but he had not seen any military vehicles. Another neighbour, Mr Kh., stated that on the night of the incident, at around 3 a.m. he had seen armed men in masks and camouflage uniforms on his balcony, from which they had climbed to upper floors, and that he had heard the noise of military vehicles but not very clearly because of his impaired hearing. According to the Government, Ms M.-M. submitted that on 12 February 2003 she had heard from her neighbours that Isa Zaurbekov had been taken away in the night by armed men in camouflage uniforms speaking Russian. It does not appear that any other witnesses were questioned in the course of the investigation.

46. The Government also stated that the investigating authorities had sent a number of enquiries to detention centres in Chechnya and further afield in the Northern Caucasus, the regional and federal security agencies and military authorities. The law-enforcement bodies had provided information that there had been no special operations on 11 February 2003 during which Isa Zaurbekov could have been detained, that no criminal proceedings had ever been brought and no special measures had ever been taken, against him, and that he had never been arrested or detained by any of them and had not been listed among detainees of any detention centres. The Government did not specify the dates on which the enquiries had been sent.

47. In the Government's submission, on 14 April 2005 criminal proceedings were brought under Article 162 (3) of the Russian Criminal Code (aggravated robbery) in connection with the fact that on 11 February 2003 the men who had abducted Isa Zaurbekov had also taken the second applicant's property. The case file was assigned the number 40057. On the same date the second applicant had been granted the status of victim in that case. On 15 April 2005 cases nos. 20123 and 40057 were joined under the former number.

4. The applicants' access to the case file

48. In the applicants' submission, upon receipt of the letter of 11 August 2005 they made a number of attempts to gain access to the file on the criminal investigation into Isa Zaurbekov's abduction and visited the district prosecutor's office on several occasions. According to them, on one occasion they were denied access to the case file as the investigator in charge was away, and on another occasion they were unable to read the case file as it had been sent to the republican prosecutor's office.

49. On 20 December 2005 the second applicant again visited the district prosecutor's office and was provided with copies of several documents from the file. Those included two requests of 15 April 2005 to prosecutors of regions neighbouring Chechnya as well as to prosecutors of various districts in Chechnya, describing Isa Zaurbekov's appearance and distinguishing marks and asking them to check whether he was listed among unidentified dead bodies and whether any criminal cases had ever been opened in connection with the discovery of corpses with his appearance and distinguishing marks, and a reminder of 5 May 2005 to carry out the steps indicated in the requests of 15 April 2005. According to the second applicant, the investigator in charge stated that he could not give her access to any other materials.

50. On 8 February 2006 the first applicant and a representative of the SRJI visited the district prosecutor's office and were given access to the case file. They were not allowed to make any photocopies or to take written notes, but the first applicant managed to memorise the contents of a number of documents.

51. In particular, while studying the case file, the first applicant came across information stating that the preliminary investigation had established that a group of armed servicemen of the Russian law-enforcement agencies had taken away Isa Zaurbekov at about 3 a.m. on 11 February 2003. The same group of servicemen had taken away two other men, a father and son named Sh., in a neighbouring district of Grozny at about 3.30 a.m. on the date in question and had attempted to take away another person, who, however, had been away from home at that moment.

52. The first applicant read a witness statement dated 23 August 2005 by Mr Sh., a relative of the father and son who had disappeared after 11 February 2003, to the effect that on 11 February 2003 armed people in four armoured personnel carriers and two UAZ vehicles had taken away the father and son from the Sh. family. Mr Sh. also stated that on 18 February 2003 he and an investigator of the Grozny prosecutor's office had visited a nearby federal checkpoint and found out that on 11 February 2003 at about 3 a.m. a federal military convoy had passed through the checkpoint in the direction of the districts where Isa Zaurbekov and the two men from the Sh. family had been apprehended. The convoy, which had returned an hour later, consisted of four armoured personnel carriers and two UAZ vehicles.

53. The Government, who were invited by the Court to comment on these submissions by the first applicant, replied that the version concerning the possible involvement of federal servicemen or personnel of the law-enforcement agencies in Isa Zaurbekov's abduction had been thoroughly checked during the investigation, but no such involvement had been established. The Government refused to provide a transcript of a witness interview of Mr Sh. despite the Court's specific request to that end, and stated that during that interview Mr Sh. had indicated that he had heard from his brother that on 12 February 2003 the father and son Sh. had been taken away from their privately owned house in a village near Grozny by a group of about 40 federal servicemen in four armoured personnel carriers and two UAZ vehicles. Mr Sh. had also talked to duty officers at a nearby federal checkpoint, who had confirmed that a military convoy had passed through in the direction of the village where the two men from the Sh. family had been taken and then back in the direction of Grozny. According to the Government, there had been no link between the abduction of Isa Zaurbekov and that of the father and son named Sh., and there were no grounds to claim that they all had been abducted by the same men.

54. The first applicant also saw a witness statement by Mr Kh. to the effect that he had heard the noise of a heavy military vehicle on the night when Isa Zaurbekov had been apprehended, and statements by Mr and Mrs Id., the second applicant's neighbours, to the effect that they had been asleep on the night of the incident and had learnt about Isa Zaurbekov's detention on the next day.

55. According to the first applicant, there were no documents disclosing State secrets or military information in the case file.

B. The Court's requests for the investigation file

56. Despite specific requests by the Court on two occasions, the Government did not furnish it with a copy of any of the documents from the criminal investigation file. They only submitted a list of documents in the file of criminal case no. 20123, from which it can be ascertained that there were at least 229 pages in the file. Relying on the information obtained from the Prosecutor General's Office, the Government stated that the investigation was in progress and that disclosure of the documents would be in violation of Article 161 of the Code of Criminal Procedure, since the file contained information of a military nature and personal data concerning the witnesses. At the same time, the Government suggested that a Court delegation could have access to the file on the premises of the authorities conducting the preliminary investigation, with the exception of "those documents [disclosing military information and the personal data of the witnesses], and without the right to make copies of the case file and transmit it to others".

57. On 11 October 2007 the application was declared partly admissible. At that stage the Court once again invited the Government to submit the investigation file and to provide information concerning the progress of the investigation after December 2005. The Court specifically requested the Government to produce the witness statement by Mr Sh. dated 23 August 2005 referred to by the first applicant (see paragraph 52 above), and any other witness statements relating to the events of 11 February 2003. In reply, the Government refused to submit any documents from the case file and informed the Court of the latest occasions on which the investigation had been suspended and reopened (see paragraph 42 above).

II. RELEVANT DOMESTIC LAW

58. For a summary of the relevant domestic law see *Kukayev v. Russia*, no. 29361/02, §§ 67-69, 15 November 2007.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

59. The Government argued that the present application should be declared inadmissible for non-exhaustion of domestic remedies, stating that the investigation into the abduction of the applicants' relative had not yet been completed and that, in accordance with Article 125 of the Russian Code of Criminal Procedure, it had been open to the applicants to lodge court complaints about the actions or omissions of the investigating or other law-enforcement authorities, but they had not availed themselves of that remedy.

60. The applicants contended that the fact that the investigation into the circumstances of their relative's disappearance was still pending cast doubt upon its effectiveness rather than indicating that their complaints were premature. They further stressed that they had on numerous occasions complained to law-enforcement bodies, including various prosecutors, about the events of 11 February 2003. In this connection the applicants referred to the Court's established case-law, stating that the authorities were under an obligation to carry out an effective investigation of their own motion once the matter had been brought to their attention. The applicants also claimed that an administrative practice consisting in the authorities' continuing failure to conduct adequate investigations into offences committed by representatives of the federal forces in Chechnya rendered any potentially effective remedies inadequate and illusory in their case. In this connection

the applicants relied on applications submitted to the Court by other individuals claiming to be victims of similar violations, and on documents by human rights NGOs and the Council of Europe.

61. The Court notes that, in its decision of 11 October 2007, it considered that the question of exhaustion of domestic remedies was closely linked to the substance of the applicants' complaints and that it should be joined to the merits. It will now proceed to assess the parties' arguments in the light of the Convention provisions and its relevant practice.

62. The Court reiterates that the rule of exhaustion of domestic remedies under Article 35 § 1 of the Convention obliges applicants to use first the remedies which are available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain both in theory and in practice, failing which they will lack the requisite accessibility and effectiveness. There is no obligation to have recourse to remedies which are inadequate or ineffective. It is incumbent on the respondent Government claiming non-exhaustion to indicate to the Court with sufficient clarity the remedies to which the applicants have not had recourse and to satisfy the Court that the remedies were effective and available in theory and in practice at the relevant time, that is to say that they were accessible, were capable of providing redress in respect of the applicants' complaints and offered reasonable prospects of success (see *Aksoy v. Turkey*, 18 December 1996, §§ 51-52, *Reports of Judgments and Decisions* 1996-VI; *Akdivar and Others v. Turkey*, 16 September 1996, § 65-68, *Reports* 1996-IV; and, most recently, *Cennet Ayhan and Mehmet Salih Ayhan v. Turkey*, no. 41964/98, § 64-65, 27 June 2006).

63. In the present case, as to the Government's argument that the investigation was still in progress and that the applicants had not complained to a court about the actions or omissions of the investigating or other law-enforcement authorities during the investigation in accordance with Article 125 of the Russian Code of Criminal Procedure, the Court firstly observes that the Government did not indicate which particular actions or omissions of the investigators the applicants should have challenged before a court. It further considers that this limb of the Government's preliminary objection raises issues which are closely linked to the question of the effectiveness of the investigation, and that it would therefore be appropriate to address the matter in the examination of the substance of the applicants' complaints under Article 2 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

64. The applicants complained of a violation of the right to life in respect of their close relative, Isa Zaurbekov. They submitted that the circumstances of his disappearance and the long period during which it had

not been possible to establish his whereabouts indicated that Isa Zaurbekov had been killed by the federal forces. The applicants also complained that no effective investigation had been conducted into their relative's disappearance. They relied on Article 2 of the Convention, which 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. Alleged failure to protect the right to life

1. Submissions by the parties

65. The applicants argued that it was beyond reasonable doubt that Isa Zaurbekov had been detained by representatives of the federal forces, this fact being confirmed by two eyewitness statements, which they had previously submitted to the Court, and by the statements of Mr Sh. contained in the file on criminal case no. 20123. They also pointed out that the investigating authorities had established the fact that the armed men who had taken Isa Zaurbekov away had used armoured personnel carriers and argued that such military vehicles had been in the exclusive possession of the federal armed forces. The applicants stressed that their relative had been apprehended in life-endangering circumstances, and the fact that he had remained missing for over three years and the Government's failure to provide any plausible explanation as to his fate proved that he had been killed. The applicants also argued that the special operation carried out on the aforementioned date had not been properly planned and supervised by the authorities to ensure that it met the requirements of Article 2 of the Convention.

66. The Government relied on the information provided by the Prosecutor General's Office and contended that the investigation had not obtained any evidence to the effect that Isa Zaurbekov was dead, or that representatives of the federal power structures had been involved in his abduction or alleged killing. They expressed doubts that any reliance could

be placed on the eyewitness statement by Ms M.-M., submitted by the applicants (see paragraph 13 above), given that this statement contradicted the information given by Ms M.-M. to the investigating authorities during her interview (see paragraph 45 above). The Government insisted that until the circumstances of Isa Zaurbekov's abduction, and the identity of the persons involved, had been established, there were no grounds to claim that his right to life secured by Article 2 of the Convention had been breached by the State.

2. The Court's assessment

67. The Court reiterates that, in the light of the importance of the protection afforded by Article 2, it must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. It has held on many occasions that, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused. The obligation on the authorities to account for the treatment of an individual within their control is particularly stringent where that individual dies or disappears thereafter (see, among other authorities, *Orhan v. Turkey*, no. 25656/94, § 326, 18 June 2002, and the authorities cited therein). Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in detention, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII, and *Çakıcı v. Turkey* [GC], no. 23657/94, § 85, ECHR 1999-IV).

68. In the present case, the Court observes that although the Government denied the State's responsibility for the abduction and disappearance of the applicants' relative, they acknowledged the specific facts underlying the applicants' version of events. In particular, it is common ground between the parties that Isa Zaurbekov was abducted from his home by men in camouflage uniforms armed with automatic firearms during the night of 11 February 2003. It has therefore first to be established whether the armed men belonged to the federal forces.

69. The Court notes at the outset that despite its repeated requests for a copy of the file on the investigation concerning the abduction of Isa Zaurbekov, the Government refused to produce it, referring to Article 161 of the Russian Code of Criminal Procedure. The Court observes that in previous cases it has found this explanation insufficient to justify the withholding of key information requested by it (see, for example, *Imakayeva v. Russia*, no. 7615/02, § 123, ECHR 2006-XIII). In view of the

foregoing, and bearing in mind the principles cited above, the Court finds that it can draw inferences from the Government's conduct in this respect.

70. It further considers that the applicants presented a coherent and consistent picture of their relative's detention on 11 February 2003. The second applicant herself was an eyewitness to the events in question and also corroborated her account with eyewitness statements by her two neighbours, Ms D. and Ms M.-M. (see paragraph 13 above). In this latter connection the Court rejects the argument by which the Government called into question the reliability of Ms M.-M.'s statement, alleging that it contradicted the oral evidence given by her to the investigating authorities. The Court notes that the applicants produced a copy of Ms M.-M.'s statement, whereas the Government failed to furnish the Court with a copy of the transcript of the witness interview on which they relied. It further observes that the applicants stated that the perpetrators had acted in a manner similar to that of a security operation. In particular, they had arrived in a large group in military vehicles during the night, had checked the identity papers of a man living in the flat and had searched the flat. Also, the intruders had spoken Russian without an accent and had had a Slavic appearance. In the Court's opinion, the fact that a large group of armed men in camouflage uniforms were able to move freely during the curfew and to apprehend a person at his home in a city area strongly supports the applicants' allegation that they were representatives of the federal forces.

71. The Court observes that where the applicant makes out a *prima facie* case and the Court is prevented from reaching factual conclusions owing to the lack of crucial 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).

72. Taking into account the above elements, the Court is satisfied that the applicants have made out a *prima facie* case that their relative was detained by State agents. The Government's statement that the investigation did not find any evidence to support the allegation of involvement of personnel of the federal military forces or security agencies in the abduction is insufficient to relieve them of the above-mentioned burden of proof. The Court is also sceptical about the Government's suggestion of the possible implication of illegal fighters in the abduction of Isa Zaurbekov, given that this allegation was not specific and was not supported by any materials. Drawing inferences from the Government's failure to submit the documents from the criminal investigation file which were in their exclusive possession or to provide another plausible explanation of the events in question, the

Court finds it established that Isa Zaurbekov was apprehended on 11 February 2003 by State agents.

73. The Court further notes that there has been no reliable news of the applicants' relative since that date. His name has not been found in any official records of detention facilities. The domestic investigation into Isa Zaurbekov's disappearance, which has dragged on for several years, has not made any meaningful findings regarding his fate. Lastly, the Government did not submit any explanation as to what had happened to him after he had been apprehended.

74. Having regard to the previous cases concerning disappearances of people in Chechnya which have come before the Court (see, for example, *Imakayeva*, cited above, and *Luluyev and Others v. Russia*, no. 69480/01, ECHR 2006-XIII (extracts)), the Court considers that, in the context of the conflict in the Chechen Republic, when a person is detained by unidentified servicemen without any subsequent acknowledgement of the detention, this can be regarded as life-threatening. The absence of Isa Zaurbekov or of any news of him for over five years corroborates this assumption. In the light of these considerations, and having regard to the particular circumstances of the case, and more specifically the considerable lapse of time since the day on which Isa Zaurbekov went missing, the Court finds that he must be presumed dead following unacknowledged detention by State agents.

75. In the absence of any plausible explanation on the part of the Government as to the circumstances of Isa Zaurbekov's death, the Court further finds that the Government have not accounted for the death of the applicants' relative during his detention and that the respondent State's responsibility for this death is therefore engaged.

76. Accordingly, there has been a violation of Article 2 of the Convention in this connection.

B. Alleged inadequacy of the investigation

1. Submissions by the parties

77. The applicants insisted that the investigation in the present case had fallen short of the Convention standards. It had been pending for several years by now, having been adjourned and reopened on several occasions, but the authorities had made no meaningful effort to verify the possible involvement of the federal forces in Isa Zaurbekov's abduction despite the overwhelming evidence to that effect. The most essential investigative steps, such as questioning the servicemen from the checkpoint situated near the block of flats in which the second applicant and Isa Zaurbekov had lived, had not been taken. The applicants also argued that they had been denied an opportunity to participate properly in the investigation.

78. The Government claimed that the investigation into the disappearance of the applicants' relative met the Convention requirement of effectiveness, as all measures envisaged in national law were being taken to identify those responsible.

2. The Court's assessment

79. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", 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, in particular by agents of the State. The investigation must be effective in the sense that it is capable of leading to the identification and punishment of those responsible (see *Oğur v. Turkey* [GC], no. 21594/93, § 88, ECHR 1999-III). In particular, there is an implicit requirement of promptness and reasonable expedition (see *Yaşa v. Turkey*, 2 September 1998, §§ 102-104, *Reports* 1998-VI, and *Mahmut Kaya v. Turkey*, no. 22535/93, §§ 106-107, ECHR 2000-III). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating the use of lethal force may generally be regarded as essential in maintaining public confidence in the maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Shanaghan v. the United Kingdom*, no. 37715/97, §§ 91-92, 4 May 2001).

80. In the instant case, the Court observes that some degree of investigation was carried out into the disappearance of the applicants' relative. It must assess whether that investigation met the requirements of Article 2 of the Convention. The Court notes in this connection that its knowledge of the criminal proceedings at issue is rather limited in view of the respondent Government's refusal to submit the investigation file (see paragraphs 56-57 above). Drawing inferences from the respondent Government's conduct when evidence was being obtained (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25), the Court will assess the merits of this complaint on the basis of the available information in the light of these inferences.

81. The Court notes first of all the apparent discrepancy in the Government's submissions as to the date on which the applicants notified

the authorities of their relative's abduction. In particular, in their memorial submitted prior to the decision on admissibility the Government indicated that the second applicant's written complaint had been received by the Grozny prosecutor's office on 14 April 2003 and the criminal proceedings had been instituted on 17 June 2003, whereas in their post-admissibility observations the Government stated that the second applicant's written complaint had been received by the Grozny prosecutor's office on 19 June 2003, following which the criminal proceedings had been commenced. In the latter case they did not specify the date on which, according to them, the proceedings had been instituted. The Court notes in this connection that the Government's conflicting accounts cannot but undermine the credibility of their submissions on the facts.

82. Having regard to the documents in its possession, namely the second applicant's complaint to the Grozny prosecutor's office bearing a handwritten note "received" and the date "14 April 2003" (see paragraph 19 above) and several letters from the domestic authorities confirming that the investigation into Isa Zaurbekov's abduction had been opened on 17 June 2003 (see paragraphs 25-27 and 37 above), the Court further accepts that it was on 14 April 2003 that the second applicant notified the authorities of the incident of 11 February 2003 and on 17 June 2003 that the criminal proceedings in that connection were commenced, that is, two months after the authorities had been made aware of Isa Zaurbekov's abduction. The Government did not provide any explanation for such a prolonged examination of the second applicant's complaint, which concerned such a serious crime as abduction, and clearly required prompt action to be taken.

83. Furthermore, it does not appear that once opened, the investigation was carried out with exemplary diligence. In particular, it does not appear, and the Government did not submit any reliable information or documents in this regard, that any investigative measures were taken at all during the first weeks, or even months, after the incident of 11 February 2003 had been reported to the authorities. Although the investigation was opened on 17 June 2003, the authorities did not commence witness interviews until August or September 2003, when, according to the Government, they questioned the applicants and the second applicant's two neighbours (see paragraphs 44-45 above). Moreover, several other neighbours of the second applicant, some of whom were eyewitnesses to the events in question, were not interviewed until 2005. Also, it appears that enquiries concerning Isa Zaurbekov were first sent to State bodies in April 2005 (see paragraph 32 above). Furthermore, it does not appear that the scene of the incident was ever inspected, or that any fair attempts were made to find any other witnesses and, in particular, to interview servicemen from a nearby checkpoint, as suggested by the applicant, or to find out whether any units of the federal armed forces or security agencies had been stationed in the

area where the second applicant and her brother had lived and, if so, which units.

84. The Court also notes a delay in granting the status of a victim to the applicants. Whilst the proceedings were instituted on 17 June 2003, the applicants, according to the Government, were declared victims on 11 August and 4 September 2003. Moreover, it appears that until August 2005, when the applicants received a letter from the district prosecutor's office describing, at least generally, the steps taken during the investigation (see paragraph 37 above), the applicants were not informed of developments in the investigation apart from several decisions on its suspension and resumption. It can also be ascertained from the applicants' submissions, which the Government did not contest, that they were not given access to the file on the criminal investigation until February 2006 (see paragraphs 48-50 above).

85. Lastly, the Court observes that the investigation remained pending from June to September 2003, when it was suspended for over a year and seven months and not resumed until April 2005, following which the investigation remained pending until December 2005, when it was again suspended for almost two years and not resumed until November 2007. The Government did not advance any plausible explanation for those considerable periods of inactivity. Between June 2003 and November 2007 it was adjourned and reopened at least four times.

86. The Court thus notes in respect of the Government's argument concerning the applicants' alleged failure to appeal to a court against the omissions of the investigators under Article 125 of the Russian Code of Criminal Procedure that in a situation where the investigation was repeatedly suspended and reopened, where the applicants were unable to access the case file until February 2006, and where they were not properly informed of the progress of the investigation, it is highly doubtful that the remedy relied on by the Government would have had any prospects of success. Moreover, the Government have not demonstrated that this remedy would have been capable of providing redress in the applicants' situation – in other words, that it would have rectified the shortcomings in the investigation and would have led to the identification and punishment of those responsible for the abduction of their relative. The Court thus considers that in the circumstances of the case it has not been established with sufficient certainty that the remedy advanced by the Government would have been effective within the meaning of the Convention. The Court finds that the applicants were not obliged to pursue that remedy, and that this limb of the Government's preliminary objection should therefore be dismissed.

87. In the light of the foregoing, and with regard to the inferences drawn from the respondent Government's submission of evidence, the Court further concludes that the authorities failed to carry out a thorough and

effective investigation into the circumstances surrounding the disappearance of Isa Zaurbekov. It accordingly holds that there has been a violation of Article 2 of the Convention on that account.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

88. The applicants complained that Isa Zaurbekov had been subjected to torture and inhuman treatment while being apprehended. The applicants further claimed that they had serious grounds to believe that he had also been ill-treated in custody. They also complained that they had suffered severe mental distress and anguish in connection with their relative's disappearance. The applicants referred to Article 3 of the Convention, which reads as follows:

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

A. Alleged ill-treatment of the applicants' relative

89. The applicants maintained that there were serious reasons to believe that their relative had been ill-treated after being apprehended. They referred to applications submitted to the Court by other individuals claiming to be victims of similar violations, and to documents by human rights NGOs and the Council of Europe reporting numerous instances where people detained in Chechnya had been found dead, or had returned from custody, showing signs of torture or ill-treatment. The applicants further contended that the authorities had failed to investigate their allegation that their relative had been ill-treated.

90. The Government argued that there was no evidence that Isa Zaurbekov had been subjected to treatment prohibited by Article 3 of the Convention.

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

92. The Court has found it established that Isa Zaurbekov was detained on 11 February 2003 by State agents. It has also found that, in view of all the known circumstances, he can be presumed dead and that the responsibility for his death lies with the State authorities (see paragraphs 72, 74 and 75 above). However, in the absence of any relevant information or evidence the Court is unable to establish, to the necessary degree of proof, the exact way in which the applicant's son died and whether he was

subjected to ill-treatment while in detention, and finds that this complaint has not been substantiated.

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

B. Alleged mental suffering of the applicants

94. The applicants maintained that they had endured severe mental suffering falling within the scope of Article 3 of the Convention in view of the State's indifference to their close relative's disappearance.

95. In the Government's submission, there was no evidence that the applicants had been subjected to treatment prohibited by Article 3 of the Convention. In their view, the investigation had not breached the requirements of that provision. The Government also submitted that "the material in the criminal case file does not make it possible to assess the degree of the applicants' mental suffering", and that there had therefore been no breach of Article 3 of the Convention on that account.

96. The Court observes that the question whether a member of the family of a "disappeared person" is a victim of treatment contrary to Article 3 will depend on the existence of special factors which give the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. The Court would further emphasise that the essence of such a violation does not mainly lie in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct (see *Orhan*, cited above, § 358, and *Imakayeva*, cited above, § 164).

97. On the facts, the Court observes that the person who went missing in the present case was the first applicant's son and the second applicant's brother. The second applicant witnessed his being apprehended. It has now been over five years since the applicants have had any news of their relative. The applicants' distress during this period is attested by their numerous efforts to prompt the authorities to act, as well as by their own attempts to search for their relative. The Court further refers to its above findings regarding the shortcomings in the investigation. In particular, it considers that delays in granting the applicants the status of victim of a crime and in allowing them access to the case file, and the lack of information about the

investigation throughout the proceedings, are elements that contributed to their suffering. It follows that the applicants' uncertainty about their relative's fate was aggravated by the fact that they were denied the opportunity to monitor the progress of the investigation.

98. The Court therefore finds that the applicants suffered distress and anguish as a result of their relative's disappearance and of their inability to find out what had happened to him or to receive up-to-date and exhaustive information on the investigation. The manner in which the applicants' complaints have been dealt with by the authorities must be considered to constitute inhuman treatment contrary to Article 3 of the Convention.

99. In the light of the foregoing, the Court finds that there has been a violation of Article 3 of the Convention on that account.

IV. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

100. The applicants complained that the provisions of Article 5 of the Convention as a whole, relating to the lawfulness of detention and guarantees against arbitrariness, had been violated in respect of Isa Zaurbekov. Article 5, in its relevant parts, provides as follows:

> "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."

101. The applicants argued that Isa Zaurbekov's detention had not satisfied any of the conditions set out in Article 5 of the Convention, had had no basis in national law and had not been in accordance with a procedure established by law or been formally registered.

102. In the Government's submission, the investigation had obtained no evidence to confirm that the applicants' relative had been detained in breach of the guarantees set out in Article 5 of the Convention.

103. The Court has frequently emphasised the fundamental importance of the guarantees contained in Article 5 for securing the rights of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. In that context, it has repeatedly stressed that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrary detention. To minimise the risks of arbitrary detention, Article 5 provides a corpus of substantive rights intended to ensure that the act of deprivation of liberty is amenable to independent judicial scrutiny and secures the accountability of the authorities for that measure. The unacknowledged detention of an individual is a complete negation of these guarantees and discloses a most grave violation of Article 5 (see, among other authorities, *Çakıcı*, cited above, § 104).

104. It has been established above that Isa Zaurbekov was detained on 11 February 2003 by State agents 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).

105. The Court further considers that the authorities should have been alert to the need to investigate more thoroughly and promptly the applicants' complaints that their relative had been detained and taken away in life-threatening circumstances. However, the Court's findings above in relation to Article 2 and, in particular, the conduct of the investigation leave no doubt that the authorities failed to take prompt and effective measures to safeguard Isa Zaurbekov against the risk of disappearance.

106. Consequently, the Court finds that Isa Zaurbekov was held in unacknowledged detention in complete disregard of the safeguards

enshrined in Article 5, and that this constitutes a particularly grave violation of his right to liberty and security enshrined in Article 5 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

107. The second applicant claimed that the intrusion on 11 February 2003 by the Russian military into the flat where she and her brother had been living and the ensuing search had been unlawful and had infringed her and Isa Zaurbekov's right to respect for their home, private and family life, as guaranteed by Article 8 of the Convention. The second applicant further complained that the seizure of her and her brother's belongings during the search on 11 February 2003 had not been justified under Article 1 of Protocol No. 1. Those Articles, in so far as relevant, read as follows:

Article 8

> "1. Everyone has the right to respect for his private and family life, his home...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 1 of Protocol No. 1

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

108. The second applicant maintained her complaints under Article 8 of the Convention and Article 1 of Protocol No. 1.

109. The Government denied that the State was responsible for the alleged breaches of Article 8 and Article 1 of Protocol No. 1. They stated that representatives of the State had never carried out "a search in accordance with a procedure established by law" in the flat in which the second applicant and her brother had lived, and claimed that therefore "the actions of unidentified persons [who had taken away Isa Zaurbekov and the applicants' property] should be qualified as robbery" and that criminal proceedings had been brought in this connection.

110. The Court has found above that the men who took Isa Zaurbekov away on 11 February 2003 were State agents. It observes that although the Government denied their responsibility for the alleged violations of the second applicant's rights under Article 8 and Article 1 of Protocol No. 1, they conceded that the men who had abducted Isa Zaurbekov had entered the flat in which the second applicant and her brother had been living and taken away the computer central processing unit, compact discs and a family photo album. The Government did not call into question the second applicant's or her brother's ownership of the property in issue, nor disputed the second applicant's argument that the persons referred to had entered the flat against her or her brother's will. The Court is therefore satisfied that the actions of the aforementioned men constituted an interference with the right of the second applicant and her brother to respect for their home secured by Article 8 of the Convention and their property rights under Article 1 of Protocol No. 1. The Court further notes the absence of any justification on the part of the State for its agents' actions in that regard. It accordingly finds that there has been a violation of the right of the second applicant and her brother to respect for their home under Article 8 of the Convention and their property rights under Article 1 of Protocol No. 1.

VI. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

111. The applicants alleged the absence of any effective remedies in respect of the violations of their rights secured by Articles 2, 3, 5 and 8 of the Convention and Article 1 of Protocol No. 1, contrary to Article 13 of the Convention, which provides as follows:

> "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."

112. The applicants alleged that in their case the domestic remedies usually available had proved to be ineffective, given that the investigation had been pending for several years without any progress and that most of their applications to public bodies had remained unanswered or had only produced standard replies.

113. The Government argued that the applicants had had effective domestic remedies, as required by Article 13 of the Convention, and that the Russian authorities had not prevented them from using those remedies. In particular, the applicants had been declared victims and had received reasoned replies to all their requests made in the context of the investigation. They also argued that, in accordance with the relevant provisions of the Russian Code of Criminal Procedure, it had been open to the applicants to lodge a court complaint in respect of the actions of the investigating authorities or, if the applicants had considered that any action

or omission by public officials had caused them damage, to seek compensation for that damage in court by virtue of the relevant provisions of the Russian Civil Code. In support of that argument, the Government referred to a decision of the Urus-Martan Town Court dated 6 August 2004 which had ordered the Urus-Martan prosecutor's office to resume the investigation into the disappearance of a claimant's son, a decision of the Shali Town Court dated 13 March 2006 by which a claimant had been allowed access to a criminal investigation file, a judgment of Nazran Town Court dated 26 February 2003 by which a plaintiff had been awarded a certain amount in respect of pecuniary and non-pecuniary damage inflicted by the federal armed forces, and a decision of the Supreme Court of the Republic of Karachayevo-Cherkessia dated 19 October 2004 by which a plaintiff had been awarded a certain amount in respect of non-pecuniary damage inflicted as a result of the unlawful actions of a prosecutor's office. The Government did not enclose copies of the decisions to which they referred.

114. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they comply with their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by acts or omissions by the authorities of the respondent State (see *Aksoy*, cited above, § 95).

115. Given the fundamental importance of the right to protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life, including effective access for the complainant to the investigation procedure leading to the identification and punishment of those responsible (see *Anguelova v. Bulgaria*, no. 38361/97, §§ 161-162, ECHR 2002-IV; *Assenov and Others v. Bulgaria*, 28 October 1998, § 117, *Reports* 1998-VIII; and *Süheyla Aydın v. Turkey*, no. 25660/94, § 208, 24 May 2005). The Court further reiterates that the requirements of Article 13 are broader than a Contracting State's obligation under Article 2 to conduct an effective investigation (see *Orhan*, cited above, § 384).

116. In view of the Court's findings above with regard to Article 2, the applicants' complaint was clearly "arguable" for the purposes of Article 13

(see *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, § 52). The applicants should accordingly have been able to avail themselves of effective and practical remedies capable of leading to the identification and punishment of those responsible and to an award of compensation for the purposes of Article 13.

117. The Court has held in a number of similar cases that in circumstances where, as in the present case, the criminal investigation into the death was ineffective and the effectiveness of any other remedy that may have existed, including the civil remedies, was consequently undermined, the State has failed in its obligation under Article 13 of the Convention (see, among other authorities, *Musayeva and Others v. Russia*, no. 74239/01, § 118, 26 July 2007, or *Kukayev*, cited above, § 117). It therefore dismisses the Government's argument that the applicants had effective remedies under the criminal or civil law and finds that there has been a violation of Article 13 of the Convention in conjunction with Article 2.

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

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

120. As regards the applicants' reference to Article 5 of the Convention, the Court refers to its findings of a violation of that provision as set out above. It considers that no separate issue arises in respect of Article 13 read in conjunction with Article 5 of the Convention, which itself contains a number of procedural guarantees relating to the lawfulness of detention.

121. Lastly, as to the second applicant's complaint under Article 13 in conjunction with Article 8 and Article 1 of Protocol No. 1, the Court considers that in a situation where the authorities denied their involvement in the alleged intrusion into the second applicant's flat and the taking of her

belongings and where the domestic investigation does not appear to have made any meaningful findings on this matter, the second applicant did not have any effective domestic remedies in respect of the alleged violations of her rights secured by Article 8 of the Convention and Article 1 of Protocol No. 1. Accordingly, there has been a violation on that account.

VII. COMPLIANCE WITH ARTICLE 38 § 1 (a) OF THE CONVENTION

122. The applicants complained that the Government's refusal to submit the file in criminal case no. 20123 was in breach of the State's obligations under Article 38 § 1 (a) of the Convention, which in its relevant part reads as follows:

> "1. If the Court declares the application admissible, it shall
>
> (a) pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities;
>
> ..."

123. The applicants invited the Court to conclude that the Government's refusal to submit a copy of the entire investigation file in response to the Court's requests was incompatible with their obligations under Article 38 § 1 (a) of the Convention.

124. The Government reiterated that the submission of the entire case file would be contrary to Article 161 of the Russian Code of Criminal Procedure. They also submitted that they had taken into account the possibility to request confidentiality under Rule 33 of the Rules of Court, but noted that the Court provided no guarantees that once in receipt of the investigation file, the applicants or their representatives would not disclose these materials to the public. In the Government's submission, the absence of any sanctions against the applicants for the disclosure of confidential information and materials meant that there were no guarantees that they would comply with the Convention and the Rules of Court. They also considered that they had complied with their obligation under Article 38 § 1 of the Convention, as they had given a reasoned refusal to submit the entire copy of the investigation file and had adduced copies of documents whose disclosure was not in contradiction with domestic law and the interests of the State and the participants in the criminal proceedings.

125. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted under Article 34 of the Convention that States should furnish all necessary facilities to make possible a proper and effective examination of applications (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 70, ECHR 1999-IV). This obligation requires the Contracting States to furnish all

necessary facilities to the Court, whether it is conducting a fact-finding investigation or performing its general duties as regards the examination of applications. Failure on a Government's part to submit such information which is in their hands, without a satisfactory explanation, may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention (see *Timurtaş v. Turkey*, no. 3531/94, § 66, ECHR 2000-VI). In a case where the application raises issues concerning the effectiveness of an investigation, the documents from the criminal investigation are fundamental to the establishment of the facts and their absence may prejudice the Court's proper examination of the complaint both at the admissibility stage and at the merits stage (see *Tanrıkulu*, cited above, § 70).

126. The Court observes that it has on several occasions requested the Government to submit a copy of the file on the investigation opened in connection with the disappearance of the applicants' relative. The evidence contained in that file was regarded by the Court as crucial to the establishment of the facts in the present case. Moreover, the Court specifically requested the Government to produce a transcript of the witness interview of Mr Sh. referred to by the first applicant (see paragraph 52 above), or any other witness statements relating to the events of 11 February 2003. The Government only produced a copy of a report which listed the investigative measures allegedly taken in the case without providing any details regarding those actions (see paragraph 56 above). Relying on Article 161 of the Russian Code of Criminal Procedure, the Government refused to submit any documents from the criminal investigation file. The Court is therefore perplexed by the Government's argument that they had submitted the documents whose disclosure was not in contradiction with domestic law and the interests of the State and the participants in the criminal proceedings.

127. The Court further notes that the Government did not request the application of Rule 33 § 2 of the Rules of Court, which permits a restriction on the principle of the public character of the documents deposited with the Court for legitimate purposes, such as the protection of national security and the private life of the parties, and the interests of justice. The Court observes that the provisions of Article 161 of the Code of Criminal Procedure, to which the Government referred, do not preclude disclosure of the documents from the file of an ongoing investigation, but rather set out the procedure for and limits to such disclosure. The Government failed to specify the nature of the documents and the grounds on which they could not be disclosed (see, for similar conclusions, *Mikheyev v. Russia*, no. 77617/01, § 104, 26 January 2006). The Court also notes that in a number of comparable cases that have been reviewed by the Court, the

Government submitted documents from the investigation files without reference to Article 161 (see, for example, *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, § 46, 24 February 2005, or *Magomadov and Magomadov v. Russia*, no. 68004/01, §§ 36 and 82, 12 July 2007), or agreed to produce documents from the investigation files even though they had initially invoked Article 161 (see *Khatsiyeva and Others v. Russia*, no. 5108/02, §§ 62-63, 17 January 2008). For these reasons, the Court considers the Government's explanations concerning the disclosure of the case file insufficient to justify withholding the key information requested by the Court.

128. Having regard to the importance of cooperation by the respondent Government in Convention proceedings and the difficulties associated with the establishment of the facts in cases such as the present one, the Court finds that the Russian Government fell short of their obligations under Article 38 § 1 (a) of the Convention on account of their failure to submit copies of the documents requested in respect of the disappearance of the applicants' relative.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

129. 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

1. Pecuniary damage

130. The first applicant, Isa Zaurbekov's mother, sought compensation in the amount of 323,829.20 Russian roubles (RUB – approximately 9,000 euros (EUR)) in respect of the loss of the financial support her son would have provided them. She stated that Isa Zaurbekov had worked as a car mechanic and that she could have counted on 30% of his monthly wages. The first applicant submitted that she was unable to provide any document concerning Isa Zaurbekov's exact earnings at the material time, but stated that in any event his income had been no less than the allowance of an unemployed person having the same qualifications. The first applicant based her calculations on the actuarial tables for use in personal injury and fatal accident cases published by the United Kingdom Government Actuary's Department in 2004 ("the Ogden tables"), with reference to the absence of any equivalent methods of calculation in Russia.

131. The Government disputed the first applicant's claims under this head as unsubstantiated.

132. The Court reiterates that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention (see, among other authorities, *Çakıcı*, cited above, § 127). It finds that there is indeed a direct causal link between the violation of Article 2 and the loss by the first applicant of the financial support which her son could have provided for her. The Court further finds that the loss of earnings applies to dependants and considers it reasonable to assume that Isa Zaurbekov would have had some earnings and that the first applicant would have benefited from them. Having regard to the applicants' submissions, the Court does not consider the amounts sought by the first applicant excessive. It therefore awards her EUR 9,000 under this head, plus any tax that may be chargeable to her on this amount.

2. Non-pecuniary damage

133. The first applicant claimed EUR 60,000 and the second applicant claimed EUR 30,000 in respect of non-pecuniary damage for the fear, anguish and distress which they had suffered as a result of their relative's disappearance.

134. The Government considered the applicants' claims to be excessive.

135. The Court observes that it has found a violation of Articles 2, 3, 5, 8 and 13 of the Convention and Article 1 of Protocol No. 1 on account of the unlawful detention and disappearance of the applicants' relative, the mental suffering endured by the applicants, the breach of the right to respect for home and the right to peaceful enjoyment of possessions and the absence of effective remedies to secure domestic redress for those violations. The Court has also found a violation of Article 38 § 1 (a) of the Convention on account of the Government's failure to submit the materials requested by the Court. The applicants must have suffered anguish and distress as a result of all these circumstances, which cannot be compensated by a mere finding of a violation. Having regard to these considerations, the Court awards, on an equitable basis, EUR 35,000 to the applicants jointly for non-pecuniary damage, plus any tax that may be chargeable to them on this amount.

B. Costs and expenses

136. The applicants were represented by lawyers from the SRJI. They submitted a schedule of costs and expenses that included research and interviews in Ingushetia and Moscow, at a rate of EUR 50 per hour, and the drafting of legal documents submitted to the Court and the domestic authorities, at a rate of EUR 50 per hour for the SRJI lawyers and EUR 150 per hour for the SRJI senior staff. The aggregate claim in respect of costs and expenses related to the applicants' legal representation amounted to

EUR 10,064.36, comprising EUR 8,325 for 60.36 hours spent by the SRJI staff on preparing and representing the applicants' case, EUR 1,100.54 for translation expenses, EUR 56.07 for international courier post to the Court and EUR 582.75 for administrative costs (7% of legal fees).

137. The Government pointed out that the applicants were only entitled to reimbursement of costs and expenses that had actually been incurred and were reasonable. They also noted that two of the SRJI's lawyers who had signed the applicants' observations on the merits had not been named in the powers of attorney.

138. The Court notes that the applicants issued a power of attorney in respect of the SRJI. It is satisfied that the lawyers indicated in their claim formed part of the SRJI staff. Accordingly, the objection must be dismissed.

139. The Court reiterates that costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred, and were also reasonable as to quantum (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI). It notes that this case has been relatively complex and has required a certain amount of research work. On the other hand, once the preparation of the initial submissions had been completed, the work did not involve a large number of documents and the Court therefore doubts whether at its later stages the case required the amount of research and preparation claimed by the applicants' representatives.

140. In these circumstances, having regard to the details of the claims submitted by the applicants, the Court awards them the reduced amount of EUR 8,000, less EUR 850 already received by way of legal aid from the Council of Europe, together with any tax that may be chargeable to the applicants. The amount awarded is to be payable to the representative organisation directly.

C. Default interest

141. 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. *Dismisses* the Government's preliminary objection;

2. *Holds* that there has been a violation of Article 2 of the Convention as regards the disappearance of Isa Zaurbekov;

3. *Holds* that there has been a violation of Article 2 of the Convention on account of the authorities' failure to carry out an adequate and effective investigation into the circumstances surrounding the disappearance of Isa Zaurbekov;

4. *Holds* that there has been no violation of Article 3 of the Convention as regards the alleged ill-treatment of Isa Zaurbekov;

5. *Holds* that there has been a violation of Article 3 of the Convention on account of the mental suffering endured by the applicants because of their relative's disappearance and the lack of an effective investigation into the matter;

6. *Holds* that there has been a violation of Article 5 of the Convention in respect of Isa Zaurbekov;

7. *Holds* that there has been a violation of Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention in respect of the second applicant and Isa Zaurbekov;

8. *Holds* that there has been a violation of Article 13 of the Convention in conjunction with Article 2 of the Convention;

9. *Holds* that there has been no violation of Article 13 of the Convention as regards the alleged violation of Article 3 of the Convention in respect of Isa Zaurbekov;

10. *Holds* that no separate issues arise under Article 13 of the Convention in respect of the alleged violation of Article 3 in respect of the applicants on account of mental suffering and in respect of the alleged violation of Article 5 of the Convention;

11. *Holds* that there has been a violation of Article 13 in conjunction with Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention in respect of the second applicant;

12. *Holds* that there has been a failure to comply with Article 38 § 1 (a) of the Convention in that the Government refused to submit the documents requested by the Court;[1]

1. Rectified on 12 March 2009: paragraph 12 added.

13. *Holds*

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, all of which, save for those payable into the bank in the Netherlands, are to be converted into Russian roubles at the rate applicable at the date of settlement:

(i) EUR 9,000 (nine thousand euros) to the first applicant in respect of pecuniary damage;

(ii) EUR 35,000 (thirty-five thousand euros) to the applicants jointly in respect of non-pecuniary damage;

(iii) EUR 7,150 (seven thousand one hundred and fifty euros) in respect of costs and expenses, to be paid in euros into the bank account in the Netherlands indicated by the applicants' representative;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

14. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 22 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Christos Rozakis
President