

Article 2 violations in disappearance cases

*Ole Solvang, Executive Director and
Roemer Lemaitre, Legal Director, Stichting
Russian Justice Initiative*

Since July 2006 the European Court of Human Rights (ECtHR) has delivered a number of judgments in cases concerning enforced disappearances in Chechnya (see <http://www.srji.org/cases.html> for an overview of the cases). In several cases (*Luluyev and Others v Russia* (No. 69480/01, 9/11/06) and *Akhmadova and Sadulayeva v Russia* (No. 40464/02, 10/05/07)), the remains of the missing persons were later discovered. In the other cases, the victims are still missing. In all of them, however, the ECtHR held that the victims must be assumed dead following unacknowledged detention, and that Russia is responsible for their deaths and thereby has violated the right to life (Art. 2 of the European Convention on Human Rights). The first Chechen judgments might signify a different approach from the Court's case law on disappearances in south-east

Turkey in the early 1990s.

In a string of judgments against Turkey handed down since May 1998, the Court gradually developed its approach to enforced disappearances. A problematic issue was whether a disappearance constitutes a violation of the substantive part of Art. 2. In other words, can the respondent state be held responsible for having killed a person who is still missing and whose body has not yet been discovered?

In the first Turkish disappearance case that the Court reviewed, *Kurt v Turkey* (No. 24276/94, 25/05/98), the applicants referred to testimonies that the disappeared had last been seen surrounded by armed soldiers, to various reports about the problem of disappearances in the region, and to the fact that the person had been missing for more than four years and argued that the disappeared person must be considered dead. Even though the Court held that

continued on page 2

continued from page 1:

Article 2 violations in disappearance cases

the government had illegally detained the disappeared, it nonetheless ruled that there was not enough 'concrete evidence' to establish that the person was in fact dead and that the government consequently could not be held in violation of Art. 2.

Subsequent judgments concerning disappearances in Turkey further developed the requirement of 'concrete evidence'. In *Cakici v Turkey* (No. 23657/94, 8/7/99) evidence that the disappeared had been ill-treated in custody was crucial in allowing the Court to find a violation of Art. 2. In *Timurtas v Turkey* (No. 23531/94, 13/6/00) and *Orhan v Turkey* (No. 25656/94, 18/6/02) the Court established that unacknowledged detention and subsequent disappearance of persons wanted by the authorities can be regarded as life-threatening.

In the 2004 judgment in the case *Ipek v Turkey* (No. 25760/94, 17/2/04), the Court determined that unacknowledged detention in and of itself – without evidence of ill-treatment or that the person was wanted – was life-threatening in the context of the situation in south-east Turkey in the given period. In cases from Turkey, therefore, it took six years of case law and almost 20 disappearance cases before the Court was willing to reach the conclusion that enforced disappearances were life-threatening.

With regard to disappearance cases from Chechnya, the development has been different. In the first Chechen case concerning disappearances, *Bazorkina v Russia* (No. 69481/01, 27/7/06), the Court relied on video footage of an execution order given by a senior military officer to reach the conclusion that the disappeared person must be assumed dead. In *Bazorkina*, therefore, the Court seemed to use the same approach as in the earlier Turkish cases, requiring circumstantial evidence, based on concrete elements to find that a disappeared person must be assumed dead.

However, in the second disappearance case from Chechnya, *Imakayeva v Russia* (No. 7615/02, 9/11/06), the Court's approach seems to differ from the one

continued on page 3

continued from page 2:

Article 2 violations in disappearance cases

in the early Turkish cases. To be sure, there are several differences between the Imakayeva case and the Kurt case. To begin with, the Imakayeva case concerned the disappearances of the applicant's son and father in two separate incidents. As regards the son, he was taken away by soldiers, while the disappeared in Kurt was last seen surrounded by soldiers. In Imakayeva, the son had been missing for more than six years, while the disappeared in Kurt had been missing for four and a half years. In addition, in Imakayeva the Court drew strong inferences from the fact that the government did not provide the Court with materials from

the criminal investigation file.

What is common for the two cases, however, is that in neither of them is there any information about the fate of the disappeared after the detention. There is no information that the disappeared were wanted prior to their detention either. Most importantly, however, when analysing the context in which the disappearance took place, the Court in Imakayeva states that "when a person is detained by unidentified servicemen without any subsequent acknowledgement of detention, this can be regarded as life-threatening". The qualifier included in the early Turkish cases – that it is only life-threatening if the person was wanted – is absent.

The first Chechen disappearance cases

decided by the Court seem to indicate that the Court has quickly gained an adequate understanding of the pattern of disappearances in Chechnya and the seriousness and extent of the problem. Indeed, the Court has on several occasions noted "with great concern" that "the phenomenon of 'disappearances' is well known" in Chechnya and lamented the authorities' apparent acquiescence in the situation (see for example para. 119, *Baysayeva v Russia* (No. 74237/01, 5/4/07)). The finding that unacknowledged detention in and of itself can be considered life-threatening in the context of counter-terrorist operations in the North Caucasus will facilitate future judgments that will properly reflect the extent of violations in Chechnya and the North Caucasus.