

# EUROPEAN COURT OF HUMAN RIGHTS

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## CHAMBER JUDGMENTS IN SIX APPLICATIONS AGAINST RUSSIA

The European Court of Human Rights (First Section) has today notified in writing three separate judgments<sup>1</sup> in the cases of *Khashiyev and Akayeva v. Russia* (nos. 57942/00 and 57945/00), *Isayeva, Yusupova and Bazayeva v. Russia* (no. 57947/00, 57948/00 and 57949/00) and *Isayeva v. Russia* (no. 57950/00). The Court held as follows:

*in the case of Khashiyev and Akayeva*

- by six votes to one that the Government's preliminary objection was unfounded;
- unanimously that there had been a **violation of Article 2** (right to life) of the European Convention on Human Rights in respect of the applicants' relatives' deaths;
- unanimously that there had been a **violation of Article 2** of the Convention in that the authorities had failed to carry out an adequate and effective investigation into the circumstances of the applicants' relatives' deaths;
- unanimously that there had been **no violation of Article 3** (prohibition of torture) in respect of the failure to protect the applicants' relatives from torture;
- unanimously that there had been a **violation of Article 3** in respect of the failure to carry out an adequate and effective investigation into the allegations of torture;
- by five votes to two that there had been a **violation of Article 13** (right to an effective remedy).

Under Article 41 of the Convention (just satisfaction) the Court unanimously awarded 15,000 euros (EUR) to the first applicant and EUR 20,000 to the second applicant in respect of non-pecuniary damage, and EUR 10,927 in respect of costs and expenses.

*in the case of Isayeva, Yusupova and Bazayeva,*

unanimously,

- that the Government's preliminary objection was unfounded;

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<sup>1</sup> Under Article 43 of the European Convention on Human Rights, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.

- that there had been a **violation of Article 2** of the Convention in respect of the respondent State's obligation to protect the right to life of the three applicants and of the two children of the first applicant;
- that there had been a **violation of Article 2** in that the authorities had failed to carry out an adequate and effective investigation into the circumstances of the attack of 29 October 1999;
- that no separate issue arose in respect of **Article 3**;
- that there had been a **violation of Article 1 of Protocol No. 1** (protection of property) in respect of the third applicant;
- that there had been a **violation of Article 13**.

Under Article 41 of the Convention the Court awarded EUR 12,000 to the third applicant in respect of pecuniary damage; EUR 25,000 to the first applicant, EUR 15,000 to the second applicant and EUR 5,000 to the third applicant in respect of non-pecuniary damage; and EUR 10,926 in respect of costs and expenses.

*in the case of Zara Isayeva*

- unanimously that the Government's preliminary objection was unfounded;
- unanimously that there had been a **violation of Article 2** of the Convention in respect of the respondent State's obligation to protect the right to life of the applicant, her son and three nieces;
- unanimously that there had been a **violation of Article 2** in respect of the failure to conduct an effective investigation;
- by six votes to one that there had been a **violation of Article 13**.

Under Article 41 of the Convention the Court unanimously awarded EUR 18,710 in respect of pecuniary damage, EUR 25,000 in respect of non-pecuniary damage and EUR 10,926 for costs and expenses.

### **1. Summary of the facts**

Magomed Khashiyev and Rosa Akayeva, who were born in 1942 and 1955 respectively, were at the material time residents of Grozny, Chechnya. They complained about extra-judicial executions of their relatives by Russian Army personnel in Grozny at the end of January 2000. The bodies of Mr Khashiyev's brother and sister and two of his sister's sons and Ms Akayeva's brother were found with numerous gunshot wounds. A criminal investigation, opened in May 2000, was suspended and reopened several times, but those responsible were never identified. In 2003 a civil court in Ingushetia ordered the Ministry of Defense to pay damages to Mr Khashiyev in relation to the killing of his relatives by unidentified military personnel.

Medka Isayeva, Zina Yusupova and Libkan Bazayeva, born in 1953, 1955 and 1949 respectively, lived in Grozny until 1999. They complained about the indiscriminate bombing by Russian military planes of civilians leaving Grozny on 29 October 1999. As a result of the bombing, Ms Isayeva was wounded and her two children and her daughter-in-law were killed, Ms Yusupova was wounded and Ms Bazayeva's cars containing the family's possessions were destroyed. A criminal investigation into the bombardment, which confirmed the applicants' version of events, was suspended and reopened several times. It was finally

closed in 2004, because the actions of the military pilots were found to have been legitimate and proportionate in the circumstances, as they had been under attack from the ground.

Zara Isayeva was born in 1954 and lived in Katyr-Yurt, Chechnya, until 2000. She complained about indiscriminate bombing of the village of Katyr-Yurt on 4 February 2000. As a result of the bombing, her son and three nieces were killed. A criminal investigation, opened in September 2000, confirmed the applicant's version of events. The investigation was closed in 2002, as the actions of the military were found to have been legitimate in the circumstances, as a large group of illegal fighters had occupied the village and refused to surrender.

## 2. Procedure and composition of the Court

The applications *Khashiyev v. Russia* and *Akayeva v. Russia* were lodged with the European Court of Human Rights respectively on 25 May and 20 April 2000. *Isayeva v. Russia*, *Yusupova v. Russia* and *Bazayeva v. Russia* were lodged with the Court respectively on 25, 27 and 26 April 2000 and *Zara Isayeva v. Russia* on 27 April 2000. They were declared admissible on 19 December 2002. A hearing took place in public in the Human Rights Building, Strasbourg, on 14 October 2004.

Judgment was delivered by a Chamber of 7 judges, composed as follows:

Christos **Rozakis** (Greek), *President*,  
Peer **Lorenzen** (Danish),  
Giovanni **Bonello** (Maltese),  
Françoise **Tulkens** (Belgian),  
Nina **Vajić** (Croatian),  
Anatoli **Kovler** (Russian),  
Vladimiro **Zagrebelsky** (Italian), *judges*,

and also Søren **Nielsen**, *Section Registrar*.

## 3. Summary of the judgments<sup>1</sup>

### Complaints

Mr Khashiyev and Ms Akayeva alleged that their relatives had been tortured and murdered by members of the Russian Army, that the investigation into their deaths had been ineffective and that they had had no access to effective remedies at national level. They relied on Article 2 (right to life), Article 3 (prohibition of torture and inhuman or degrading treatment) and Article 13 (right to an effective remedy) of the European Convention on Human Rights.

Ms Isayeva, Ms Yusupova and Ms Bazayeva claimed that their relatives' and their own right to life and to protection from inhuman and degrading treatment had been violated. Ms Bazayeva also complained that the destruction of her cars containing the family's belongings constituted an infringement of her property rights. The applicants further argued that the investigation undertaken had been ineffective and that they had had no access to an effective

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<sup>1</sup> This summary drafted by the Registry is not binding on the Court.

remedy at national level. They relied on Articles 2, 3 and 13 of the Convention and (Ms Bazayeva) Article 1 of Protocol No. 1 (protection of property).

Zara Isayeva claimed that her relatives' right to life had been violated, that the investigation had been ineffective and that she had had no access to an effective remedy. She relied on Articles 2 and 13 of the Convention.

### **Decision of the Court**

#### The Government's preliminary objection in all three cases (exhaustion of domestic remedies)

The Government submitted that Russian law provided two avenues of recourse for the victims of illegal and criminal acts attributable to the State or its agents, namely civil procedure and criminal remedies.

As regards a civil action, two possibilities had been advanced: an application to the Supreme Court or filing a complaint with other courts. However, at the date of the admissibility decisions in these three cases, no example had been produced of the Supreme Court or other courts being able, in the absence of results from the criminal investigation, to consider the merits of a claim relating to alleged serious criminal actions.

In the course of the proceedings Mr Khashiyev had brought an action before a district court. However, despite a positive outcome in the form of a financial award, without the benefit of the conclusions of a criminal investigation, this action was incapable of leading to findings as to the perpetrators of assaults or their responsibility.

The applicants had accordingly not been obliged to pursue the civil remedies, and the preliminary objection was in that respect unfounded.

As to criminal law remedies, the objection raised issues concerning the effectiveness of the criminal investigation and was joined by the Court to the merits.

#### Alleged violation of Article 2 of the Convention

The applicants in all three cases alleged failure on the part of the State to protect the right to life in breach of Article 2. They also submitted that the authorities had failed to carry out an effective and adequate investigation.

#### **A. The alleged failure to protect life**

The Court set out its case-law in this area and notably the following general principles. First, in assessing evidence as to the violation of Article 2, the relevant standard of proof was "beyond reasonable doubt". The Court recalled, however, that strong presumptions of fact arose in respect of injuries and death occurring during detention. In such circumstances the burden of proof lay with the authorities to provide a satisfactory and convincing explanation. It then noted that, where potentially lethal force was used in pursuit of a permitted aim, the force used had to be strictly proportionate to the achievement of that aim. Operations involving potential use of lethal force had to be planned and controlled by the authorities so as to minimise the risk to life. Authorities had to take all feasible precautions in the choice of

means and methods with a view to avoiding and, in any event, minimising incidental loss of civilian life.

*Case of Khashiyev and Akayeva*

The Court first noted that, in reply to its request, the Government had submitted only about two-thirds of the criminal investigation file. The rest was, in the Government's view, irrelevant. It was inherent in proceedings related to cases of this nature that in certain instances solely the respondent Government had access to information capable of corroborating or refuting the applicant's allegations. A failure on the Government's part to submit such information without a satisfactory explanation could give rise to the drawing of inferences as to the well-founded character of such allegations.

On the basis of the material in its possession the Court found it established that the applicants' relatives had been killed by military personnel. No other plausible explanation as to the circumstances of the deaths had been forthcoming, nor had any justification been relied on in respect of the use of lethal force by the State agents. There had been accordingly a violation of Article 2 of the Convention.

*Case of Isayeva, Yusupova and Bazayeva*

It was undisputed that the applicants had been subjected to an aerial missile attack, during which the first applicant's two children had been killed and the first and the second applicants wounded.

At the outset the Court noted that its ability to assess the legitimacy of the attack, as well as how the operation had been planned and executed, had been hampered by the failure to submit a copy of the complete investigation file. The documents submitted by the parties, including the part of the investigation file which had been disclosed, nevertheless allowed certain conclusions to be drawn as to whether the operation had been planned and conducted in such a way as to avoid or minimise, to the greatest extent possible, damage to civilians.

The Government had claimed that the aim of the operation, which had resulted in the losses suffered by the applicants, had been to protect persons from unlawful violence within the meaning of Article 2 § 2 (a) of the Convention. In the absence of corroborated evidence that any unlawful violence had been threatened or likely, the Court retained certain doubts as to whether the aim could at all be applicable. However, given the context of the conflict in Chechnya at the relevant time, the Court assumed that the military had reasonably considered that there had been an attack or a risk of attack, and that the air strike had been a legitimate response to that attack.

The applicants and other witnesses to the attack had testified that they had been aware in advance of the "humanitarian corridor" to Ingushetia for Grozny residents on 29 October 1999, and that there had been numerous civilian cars and thousands of people on the road. They also referred to an order from a senior military officer at the roadblock telling them to return to Grozny and to his giving them assurances as to their safety. The result of that order had been a traffic jam several kilometres long.

This should have been known to the authorities who were planning military operations anywhere near the Rostov-Baku highway on 29 October 1999 and should have alerted them

to the need for extreme caution as regards the use of lethal force. Yet it did not appear that those responsible for planning and controlling the operation, or the pilots themselves, had been aware of this. This had placed the civilians on the road, including the applicants, at a very high risk of being perceived as suitable targets by the military pilots.

A very powerful weapon had been used - according to the domestic investigation, 12 S-24 non-guided air-to-ground missiles had been fired. On explosion, each missile created several thousand pieces of shrapnel and its impact radius exceeded 300 metres. Anyone who had been at that time on that stretch of road would have been in mortal danger.

In addition, the Government had failed to invoke the provisions of domestic legislation at any level governing the use of force by its agents in such situations, and this was also directly relevant to the proportionality of the response to the alleged attack.

It followed that, even assuming that the military had been pursuing a legitimate aim, the Court did not accept that the operation of 29 October 1999 had been planned and executed with the requisite care for the lives of the civilians. There had therefore been a violation of Article 2 of the Convention.

#### *Case of Zara Isayeva*

It was undisputed that the applicant and her relatives had been attacked when trying to leave Katyr-Yurt through what they had perceived as a safe exit as they fled from heavy fighting. A bomb dropped from a military plane had exploded near their minivan, as a result of which the applicant's son and three nieces had been killed and the applicant and her other relatives had been wounded.

The Government had suggested that the use of force had been justified under paragraph 2 (a) of Article 2 of the Convention.

The Court accepted that the situation that existed in Chechnya at the relevant time called for exceptional measures by the State. The undisputed presence of a very large group of armed fighters in Katyr-Yurt and their active resistance might have justified use of lethal force by the State agents, thus bringing the situation within paragraph 2 of Article 2. A balance nevertheless had to be struck between the aim pursued and the means employed to achieve it.

At the outset the Court observed that its ability to make an assessment had been hampered by the fact that the Government had not disclosed most of the documents related to the military action. The documents submitted by the parties and the investigation file nevertheless allowed certain conclusions to be drawn as to whether the operation had been planned and conducted in such a way as to avoid or minimise, to the greatest extent possible, harm to civilians, as was required by Article 2 of the Convention.

The Court concluded that the military operation in Katyr-Yurt, aimed at either disarmament or destruction of the fighters, had not been spontaneous. The Court regarded it as evident that when the military had contemplated the deployment of aviation equipped with heavy combat weapons within the boundaries of a populated area, they should also have considered the inherent dangers. There was however no evidence to conclude that such considerations played a significant role in the planning.

The military used heavy free-falling high-explosion aviation bombs FAB-250 and FAB-500 with a damage radius exceeding 1,000 metres. Using this kind of weapon in a populated area, outside wartime and without prior evacuation of the civilians, was impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society.

It was further noted that no martial law and no state of emergency had been declared in Chechnya, and no derogation has been entered under Article 15 of the Convention. The operation therefore had to be judged against a normal legal background.

Even when faced with a situation where, as the Government had submitted, the villagers had been held hostage by a large group of fighters, the primary aim of the operation should be to protect lives from unlawful violence. The use of indiscriminate weapons stood in flagrant contrast with this aim and could not be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents.

The documents reviewed by the Court confirmed that some information about a safe passage had been conveyed to the population. However, no document or statement by the military referred to an order to stop the attack or to reduce its intensity. While there were numerous references in the servicemen's statements to the declaration of a humanitarian corridor, there was not a single one which referred to its observance.

The military experts' report of 11 February 2002 had concluded that the actions of the commanders had been legitimate and proportionate to the situation. As regards minimising civilian casualties, the report had based this conclusion on two main grounds: organisation and implementation of the exodus of the population and choosing a localised method of fire. The Court did not consider that the documents contained in the case file and reviewed by it could give rise to such conclusions. The report also concluded that the evacuation had probably been prevented by the fighters. Equally, nothing in the documents reviewed supported the conclusion that the fighters had been holding back the villagers or preventing them from leaving.

The Government's failure to invoke the provisions of any domestic legislation governing the use of force by State agents in such situations was, in the circumstances, also directly relevant to the Court's considerations with regard to the proportionality of the response to the attack.

To sum up, accepting that the operation in Katyr-Yurt on 4-7 February 2000 had pursued a legitimate aim, the Court did not find that it had been planned and executed with the requisite care for the lives of the civilian population. There had therefore been a violation of Article 2.

## **B. The alleged inadequacy of the investigation**

The Court recalled its case-law in this area and notably the need, in cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility. The obligations under Article 2 could not be satisfied merely by awarding damages. The investigation had to be timely, effective and not to be dependent for its progress on the initiative of the survivors or the next of kin.

*Case of Khashiyev and Akayeva*

An investigation had been carried out into the killings of the applicants' relatives. However, it had been flawed by serious failures once it commenced, which it had done only after a considerable delay. In particular, the investigation did not seem to have pursued the possible involvement of a certain military unit directly mentioned by several witnesses.

The Government pointed out that the applicants could have appealed the results of the investigation. The Court was not persuaded that such appeal would have been able to remedy its defects, even if the applicants had been properly informed of the proceedings and had been involved in it. The applicants must therefore be regarded as having complied with the requirement to exhaust the relevant criminal-law remedies.

The Court accordingly found that the authorities had failed to carry out an effective criminal investigation into the circumstances surrounding the deaths of the applicants' relatives. There had therefore been a violation of Article 2 also in this respect.

*Case of Isayeva, Yusupova, Bazayeva*

A criminal investigation had been carried out in this case. There had been, however, a considerable delay before an investigation had been opened into credible allegations of numerous civilian casualties and an attack on the Red Cross vehicles. The Court also noted a number of serious and unexplained failures to act once the investigation had commenced.

It did not appear for example that an operations record book, mission reports and other relevant documents produced immediately before or after the incident had been requested or reviewed. There appeared to have been no efforts to establish the identity and rank of the senior officer at the "Kavkaz-1" military roadblock who had ordered the refugees to return to Grozny and allegedly promised them safety on the route, and to question him. No efforts had been made to collect information about the declaration of the "safe passage" for 29 October 1999, or to identify someone among the military or civil authorities who would have been responsible for the safety of the exit. The investigation had not taken sufficient steps to identify other victims and possible witnesses of the attack. There had also been a considerable delay before the applicants were questioned and granted victim status in the proceedings.

The authorities had therefore failed to carry out an effective investigation into the circumstances of the attack on the civilian convoy on 29 October 1999. The Court accordingly dismissed the Government's preliminary objection in this respect and held that there had been a violation of Article 2 under this head as well.

*Case of Zara Isayeva*

An investigation had been opened only upon communication of the complaint to the respondent Government in September 2000. There had thus been an unexplained delay of several months before an investigation into credible allegations of dozens of civilian deaths commenced. However, the Court also noted the significant amount of work carried out by the investigation in an attempt to put together an account of the assault.

The Court nevertheless observed several serious flaws in the part of the investigation file submitted to it, such as the lack of reliable information about the declaration of the “safe passage” for civilians. No persons had been identified among the military or civil authorities as responsible for the declaration of the corridor and for the safety of those using it. No clarification has been provided on the absence of coordination between the announcements of a “safe exit” and the apparent lack of consideration given to this by the military in planning and executing their mission.

Information about the decision of 13 March 2002, by which the proceedings had been closed and the decisions to grant victim status quashed, had not been communicated to the applicant and other victims directly, as the domestic relevant legislation prescribed. The Court thus did not accept that the applicant had been properly informed of the proceedings and could have challenged its results.

The decision to close the investigation had been based on the military experts’ report of February 2002. The applicant had not had any realistic possibility of challenging its conclusions and, ultimately, those of the investigation.

The authorities had therefore failed to carry out an effective investigation into the circumstances of the assault on Katyr-Yurt on 4-7 February 2000. The Court accordingly dismissed the Government’s preliminary objection in this respect and held that there had been a violation of Article 2 under this head too.

#### Alleged violation of Article 3 of the Convention

##### *Case of Khasiyev and Akayeva*

The Court was unable to find that beyond all reasonable doubt the applicants’ relatives had been subjected to treatment contrary to Article 3 of the Convention.

On the other hand, having regard to the lack of a thorough and effective investigation into credible allegations of torture, the Court held that there has been a violation of the procedural requirements of Article 3.

##### *Case of Isayeva, Yusopova and Bazayeva*

The Court considered that the consequences described by the applicants had been a result of the use of lethal force by the State agents in breach of Article 2. The Court did not find that separate issues arose under Article 3.

#### Alleged violation of Article 1 of Protocol No. 1 (*Bazayeva*)

Mrs Bazayeva had been subjected to an aerial attack, which had resulted in destruction of her family’s vehicles and household items. This constituted grave and unjustified interference with her peaceful enjoyment of her possessions. There had thus been a violation of Article 1 of Protocol No. 1.

Alleged violation of Article 13 of the Convention in conjunction with Articles 2 and 3 (Khashiyev and Akayeva), Article 2 of the Convention and Article 1 of Protocol No. 1 (Isayeva, Yusopova and Bazayeva) and Article 2 of the Convention (Zara Isayeva)

In view of the findings in respect of the relevant provisions, the applicants' complaints were clearly "arguable" for the purposes of Article 13. They 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.

In the present cases the criminal investigation had been ineffective in that it lacked sufficient objectivity and thoroughness, and the effectiveness of any other remedy, including the civil remedies, had been consequently undermined. The Court therefore found that the State had failed in its obligation under Article 13 of the Convention.

In the case of *Khashiyev and Akayeva* Judge Kovler and Judge Zagrebelsky expressed partly dissenting opinions. These opinions are annexed to the judgment.

The Court's judgments are accessible on its Internet site (<http://www.echr.coe.int>).

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