

La CEDU su violazione del diritto alla vita (CEDU, sez. III, sent. 4 febbraio 2020, ric. n. 56120/13)

La Corte Edu si pronuncia sul caso del signor Baysultanov che, nel 2006, aveva subito presso la propria dimora a Khasavyurt, una violenta operazione della polizia russa, finalizzata ad arrestare il leader militare di un gruppo armato illegale, che si presumeva nascosto presso l'abitazione del ricorrente. Durante l'operazione il signor Baysultanov rimase ferito e sua moglie uccisa.

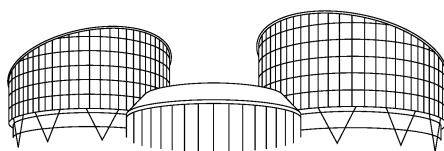
Il ricorrente - che nel marzo 2007 era stato assolto dall'appartenenza al predetto gruppo armato e condannato ad una pena detentiva di 18 mesi in una colonia correttiva solo per possesso illegale di armi da fuoco (un Kalashnikov ritrovato in casa sua) - aveva denunciato l'accaduto, lamentando in particolare uno sproporzionato uso letale della forza da parte della polizia.

Solo nel giugno 2009 era stato aperto un procedimento penale, indagine chiusa e ripresa più volte fino alla definitiva archiviazione a settembre 2013.

I Giudici di Strasburgo hanno constatato non solo il notevole ritardo nell'apertura di un'indagine penale, avvenuta a giugno 2009, cioè più di due anni e mezzo dopo l'incidente, ma anche le numerose carenze nell'inchiesta: ad esempio, gli investigatori non erano stati in grado di spiegare la contraddizione tra le diverse versioni dell'incidente: la polizia dichiarava che il ricorrente e sua moglie avevano sparato per primi, circostanza negata dal ricorrente; né risultava acclarato con certezza che uno dei due fosse armato.

La Corte ha riscontrato che le autorità nazionali non avevano risposto adeguatamente alle gravi accuse di sproporzionato uso letale della forza, sottolineando che il fallimento dello Stato nel dovere di eseguire un'indagine efficace aveva ingenerato un senso di impunità tra i suoi agenti. I Giudici di Strasburgo colgono l'occasione per ricordare l'importanza di un'indagine conforme ai dettami della Convenzione su un simile uso della forza, fondamentale per preservare la fiducia dei cittadini nell'adesione degli agenti ai principi dello Stato di diritto e per prevenire qualsiasi dubbio di collusione o di tolleranza di atti illeciti.

La Corte Edu ha, così, concluso che, non avendo il Governo dimostrato l'assoluta necessità dell'uso della forza letale e non avendo le autorità interne garantito una efficace inchiesta sull'accaduto, c'era stata una violazione dell'art.2 CEDU sia sotto il profilo sostanziale che procedurale.



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

THIRD SECTION

CASE OF BAYSULTANOV v. RUSSIA

(Application no. 56120/13)

JUDGMENT

STRASBOURG

4 February 2020

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

In the case of Baysultanov v. Russia,

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

Alena Poláčková, *President,*

Dmitry Dedov,

Gilberto Felici, *judges,*

and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 14 January 2020,

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

PROCEDURE

1. The case originated in an application (no. 56120/13) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Mr Gasan Baysultanov (“the applicant”), on 24 July 2013.

2. The applicant was initially represented by a retired judge, Mr G. Kostrov, and then by the Stichting Russian Justice Initiative, in partnership with another NGO, Astreya (SRJI/Astreya). The Russian Government (“the Government”) were represented by Mr M. Galperin, Representative of the Russian Federation to the European Court of Human Rights.

3. On 19 June 2017 the Government were given notice of the complaints under Article 2 of the Convention concerning the killing of the applicant’s wife and wounding of the applicant, and of the authorities’ failure to investigate the matter effectively. The remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court. The Government did not object to the examination of the application by a Committee.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1981 and lives in Khasavyurt, the Republic of Dagestan, Russia. He is the widower of Ms Saniyat Magomedova, who was born in 1983, and allegedly a former colleague of Mr A.B., a military leader (амир (emir)) of an illegal armed group who was wanted by the police.

A. Planning of Mr A.B.'s arrest

5. On 2 November 2006 Dagestan law-enforcement authorities obtained information about Mr A.B.'s whereabouts. According to it, he had been sheltered at the applicant's house in Khasavyurt and both the applicant and Mr A.B. were armed with machine guns.

6. At about 8 p.m. on 2 November 2006 Dagestan law-enforcement authorities including the heads of the Khasavyurt district police station (Officer G.G), the Khasavyurt police unit for fighting against organised crime (Officer G.G.), the Kazbek district operative unit (Officer A.S.) and the deputy minister of the Dagestan Ministry of the Interior (Officer A.K.) conducted a meeting to plan Mr A.B.'s arrest.

7. They decided that on the next morning – 3 November 2006 – at around 6.30 a.m. a special police unit would enter the applicant's house to ensure the arrest of Mr A.B., if he refused to surrender. The Kazbek district operative unit headed by Officer A.S. and several other groups of officers would secure the premises from the back courtyard of the house and back up the special police unit.

8. At around 2 a.m. on 3 November 2006 Officer A.S. instructed his subordinates about the forthcoming operation, saying that they would participate in a special operation aimed at the arrest or killing of a particularly dangerous criminal, Mr A.B. The unit's task was to secure the area and back up their colleagues from the special police unit.

B. Special operation of 3 November 2006

9. At about 3 or 4 a.m. on 3 November 2006 police officers from the Kazbek district operative unit, the Novolakskiy district police station, the Khasavyurt town police station and the consolidated police unit of the Russian Ministry of the Interior in Dagestan arrived at the area in the vicinity of the applicant's house in numerous vehicles, including armoured personnel carriers. They left the vehicles and silently walked to their positions. The special unit which was supposed to enter the applicant's house set itself up around 50 metres from the house awaiting surrender negotiations to begin in the morning. Other officers cordoned off the area around the applicant's house. Officer A.S. with his subordinates waited in ambush under a shed in a neighbouring courtyard. They were separated from the applicant's house by a wire-mesh fence.

10. At about 5 or 6 a.m. on 3 November 2006 the applicant and his wife stepped out from the house and walked to the outhouse. Ms Magomedova was in a light-coloured sweatshirt put over a grey dress. According to the applicant, Ms Magomedova was carrying a water jug and he was unarmed. According to the officers involved in the special operation either the applicant or his wife allegedly had a Kalashnikov model machine gun no. XI 7195 from 1960 (hereinafter "the Kalashnikov") and suddenly opened fire at the officers.

11. Without any warnings or orders from their superior Officers A.A., M.U., M.A., and A.Sh. opened fire on the applicant and his wife. An explosion of a grenade thrown by an unknown person followed. As a result, the applicant's wife, Ms Magomedova, was shot dead next to the outhouse.

Her body had multiple gunshot and shrapnel wounds. The applicant, who had been walking next to her, received a perforating gunshot to the chest and fell bleeding to the ground. Then he was arrested and taken to the hospital.

12. From the documents submitted to the Court it appears that the special operation was filmed (see paragraph 40 below).

C. Criminal case against the applicant

13. On 3 November 2006 the senior investigator of the Khasavyurt prosecutor's office received a report about an attack by the applicant on the police officers during a special operation at 6.50 a.m. earlier that day and ordered that a criminal case (no. 610531) be opened against the applicant on suspicion of involvement in an illegal armed group and attacking police officers.

14. On 3 November 2006, shortly after the reported event, the investigators from the Khasavyurt investigations department of the Dagestan prosecutor's office ("the investigators") examined the crime scene. In the courtyard they found Ms Magomedova's body, the Kalashnikov with a magazine containing nine bullets and more than sixty spent cartridge cases and bullets shot from the service personnel's firearms. No cartridge cases from the Kalashnikov were found in the radius of 6 or 7 metres around the firearm. According to a subsequent statement by the officer who had collected the cartridge cases the courtyard was littered with scrap metal and fallen tree leaves, which complicated the search and prevented him from using a metal detector. That, in turn, could have hindered the finding of all of the cartridge cases. The experts, who were present at the crime scene, examined the Kalashnikov and found no fingerprints on it. Its subsequent examination showed that its chamber was empty, which suggested that it had not been fired.

15. Several hours later the investigators questioned the applicant at the hospital. He submitted that in the morning Ms Magomedova had gone outside for morning prayers. Having returned she had told him that there had been strangers in their yard. He had taken a machine gun to scare the strangers away and together with his wife had gone outside to check what the situation had been. The service personnel had immediately opened fire on them and he had fallen to the ground. Later, the applicant retracted his statement saying that he had neither been armed nor had he known Mr A.B.

16. The next day the investigators questioned Officer A.S and his subordinate Officer M.U. They submitted that the unit had been instructed to secure the area during the special operation aimed at arresting or eliminating a particularly dangerous criminal, Mr A.B. However, the special operation had not gone as planned as at about 5 a.m. (before the planned entry into the house) two people had run out of it shouting Allāhu akbar! ("God is the greatest!") and shooting at the officers. The latter had had to shoot back without warning. As soon as the fire had ceased, the police unit left the place. On unspecified dates later similar statements were made by Officers M.A. and A.Sh.

17. On various dates between 3 and 7 November 2006 the experts took gunshot-residue swabs from the body of Ms Magomedova and the applicant. No residue was found.

18. On 18 November 2006 the ballistic experts examined cartridge cases from the crime scene and established that thirty-six of them had been fired from Officer A.S.'s machine gun. The origin of five

cartridge cases shot from a similar weapon and the origin of twenty-eight other cartridge cases remained unknown.

19. The applicant did not give his consent for his wife's autopsy and she was buried without the exact cause of her death being established.

20. On 29 December 2006 the investigators formally indicted the applicant with membership of an illegal armed group, attacking police officers, and unlawful possession of firearms.

21. In February and March 2007 the Dagestan Supreme Court examined the criminal case against the applicant. During the trial the applicant stated that he had known Mr A.B. as a former colleague and that on the night between 2 and 3 November 2006 Mr A.B. had not stayed in his house. He also stated that early in the morning on 3 November 2006 he had been walking with his wife, Ms Magomedova, to the outhouse, when they had been shot. The police, who had opened fire, had killed his wife and wounded him in the chest. He had lost consciousness and had regained it only when the police officers were putting him into their vehicle.

22. On 13 March 2007 the applicant was acquitted of membership of an illegal armed group and attacking police officers, but was sentenced to a one-and-a-half-year term in a correctional colony for unlawful possession of firearms. Following examination of the applicant's case, having regard to the absence of Kalashnikov cartridges at the crime scene, the absence of a bullet in the Kalashnikov chamber or gunshot residue on the applicant, the court stated that Officers A.S., M.U., M.A., and A.Sh. had given the investigators false statements about the gunfire the applicant and his wife had allegedly directed at them, as the officers had wanted to justify their "quite inadequate actions which were not justified by the circumstances" of opening fire unprovoked, as a result of which they had wounded the applicant and killed his wife. Furthermore, the court stated the following:

" ... [T]hus, the evidence presented by the prosecution shows neither that Mr Baysultanov committed the attack on the police officers, nor that he opened fire with a machine gun. In connection with this, the court has serious doubts as to the truthfulness of the statements given by the 'victims' – [Officers A.S., and M.U.] – and witnesses – [Officers A.Sh. and M.A.] – as well as statements of other witnesses that state that Mr Baysultanov had run out into the courtyard whilst firing at them with a machine gun ... The statements of [Officers A.S., Mr M.U., Mr A.S. and M.A.] are not actually confirmed by the prosecution evidence; they are essentially refuted by it ...

In such circumstances, based only on the statements of the 'victims', [Officers A.S. and M.U.], and witnesses [Officers A.S. and M.A.], who are interested parties in the proceedings and who, without their commanders' orders, opened fire with their service firearms and wounded Mr Baysultanov and killed his spouse ... the court cannot conclude that it has been proven that Mr Baysultanov opened fire with the machine gun and even more so, that he can be found guilty of attacking the police officers [... who ...] with the aim of justifying their actions, stated that Mr Baysultanov had been the first to open fire ..."

23. On 19 July 2007 the applicant's sentence was upheld on appeal by the Russian Supreme Court.

D. Official investigation into the use of force by the police

24. As submitted by the applicant and not disputed by the Government, shortly after the special operation, the applicant complained to the authorities of his wounding and his wife's killing in a situation when the use of lethal force had not been necessary.

25. On 9 December 2006 the Khasavyurt prosecutor's office, referring to the statements by Officers A.S. and M.U. and to those given by the applicant on 3 November 2006 (see paragraphs 15 and 16 above), refused to open a criminal case into the incident for lack of *corpus delicti*.

26. On 5 February 2009 the Khasavyurt Investigative Committee annulled the above decision on the grounds of the applicant's acquittal on charges of membership of an illegal armed group and attacking police officers (see paragraph 22 above). The investigators were ordered to question the officers involved in the special operation with a view to establishing the circumstances of Ms Magomedova's death.

27. Having questioned Officers A.S., A.Sh., and M.A, who repeated their statements that the applicant or his wife had started the exchange of gunfire, the investigators refused opening a criminal case on 8 February 2009 for the second time.

28. On 8 June 2009 the investigators opened criminal case no. 910273 under Article 109 § 2 of the Russian Criminal Code (involuntary manslaughter resulting from undue execution of professional duties) into the circumstances surrounding Ms Magomedova's killing. The investigation was repeatedly suspended for failure to identify the culprits on 8 August and 1 October 2009, 13 January and 15 February 2010. Each time the investigators referred to the lack of opportunity to examine Ms Magomedova's body. The post-mortem examination would give the investigators an opportunity to identify the officers who had fired the fatal shots. On 31 August and 13 November 2009, and 14 January and 20 March 2010, respectively, the decisions to suspend the investigations were annulled by the senior authority, which each time noted the need to question the officers involved in the special operation and order expert examinations which would assist the investigators in the identifying the culprits.

29. From the documents submitted it appears that in the meantime the applicant complained of the use of lethal force against him and his wife, asking that the incident be investigated effectively. In particular, on 28 August 2009 he submitted a request to that end to the head of the Russian Investigative Committee.

30. On 7 April 2010 the investigators exhumed the body of Ms Magomedova for a post-mortem examination. Having examined the body on 12 May 2010, the experts concluded that they could not be absolutely sure about the exact cause of Ms Magomedova's death as she had sustained many serious injuries. In particular, bullet holes were found in her frontal bone, sacrum, and a rib. Any of those injuries might have resulted in her death. The experts established that the injuries had been caused by shells and bullets of small and medium calibres.

31. On 20 May 2010 the investigation was suspended once again.

32. On 14 March 2011 it was resumed. The supervising investigating authority ordered the investigators to establish the origin of five unidentified cartridge cases found at the crime scene (see paragraph 18 above) and to identify the officer who had used a grenade against the applicant and his wife.

33. On 16 March 2011 a new forensic examination was ordered. On 1 April 2011 the experts concluded that owing to the lack of an autopsy, which should have been carried out shortly after Ms

Magomedova's death, it was impossible to establish the cause of her death and the order in which she had sustained the injuries.

34. On an unspecified date the investigators requested that the Ministry of the Interior in Dagestan provide them with information about the firearms which had been used in the course of the special operation. The authority replied that they did not have that information.

35. On 14 April 2011 the investigation was suspended and then, on 12 September 2011 it was resumed again.

36. On 13 October 2011 the investigators carried out a crime scene reconstruction. Having fired several shots from a Kalashnikov they established that the cartridges had been ejected out to around 6 to 9.5 metres from the Kalashnikov.

37. On 29 October 2011 the investigators questioned Officer A.S. He submitted that as soon as the special operation of 3 November 2006 had ended, an unidentified officer had removed a bullet from the chamber of the Kalashnikov found after the special operation in the applicant's courtyard and put it in its magazine, which was a usual safety measure.

38. On 9 November 2011 Officer A.S. underwent a lie-detector test (polygraph), which confirmed that he believed in the veracity of his previous statements.

39. On 12 November 2011, referring to the results of the lie-detector test and Officer A.S.'s statements, the investigation in the case was terminated for lack of corpus delicti in the actions of the police officers.

40. On 7 December 2011 the aforementioned decision was annulled for the investigators' failure to explain the origin of all cartridge cases found in the applicant's courtyard and to identify the individual who had thrown the grenade during the special operation. It was noted that the investigators had failed to assess the lawfulness of the special operation as a whole and the use of firearms by the police. Moreover, the decision further stated that the investigators had failed to obtain video footage of the special operation from a Dagestan television company.

41. On 28 December 2011 the investigation was resumed, it was subsequently suspended on 28 January 2012 until a new resumption on 27 February 2012.

42. In the meantime, on 9 February 2012 Officers M.U. and M.A. underwent a lie-detector test, which confirmed that they genuinely believed that the applicant or his wife had fired at the police from the Kalashnikov on 3 November 2006.

43. On 20 February 2012 the ballistic experts concluded that the injuries on the applicant and his late wife could have resulted from gunshots by Officers A.S., M.A., and A.Sh., from the Kazbek district operative unit.

44. On 27 March, 4 May, 16 July, 22 August and 20 October 2012 the investigators discontinued the proceedings for the lack of corpus delicti in the actions of the law-enforcement officers. The aforementioned decisions were annulled on 4 April, 15 June, 17 July and 20 December 2012, and 30 April 2013 respectively. The supervising authority criticised the investigators for failure to take basic steps and ordered that those steps be taken, including the collection and examination of the firearms belonging to Officers A.S., M.A., M.U., A.Sh., and S.M. and the bullets from the Kalashnikov, one of which might have had traces of having been transferred from its magazine to the chamber and back.

45. In the meantime, the Dagestan Ministry of the Interior's internal security service carried out an internal investigation into the incident and prepared a report dated 4 May 2012. It stated that owing to the conflicting evidence it had been impossible to establish whether the service personnel had complied with "the requirements of the law" during the special operation.
46. On 29 June 2012 the ballistic experts examined gunshot traces on the roof of the shed under which Officer A.S.'s unit had set the ambush during the special operation. The experts concluded that the traces might have been caused by gunshots fired by the applicant at the officers.
47. On an unspecified date the Kazbek district police informed the investigators that no grenades had been provided to its operative unit in 2006.
48. On 30 July 2012 the applicant's father complained to the head of the Investigative Committee in the Republic of Dagestan of the investigators' failure to identify and prosecute the officers responsible for wounding the applicant and killing Ms Magomedova. No reply was given to this complaint.
49. On 2 August 2012 the investigators obtained the results of the expert examination on the explosives. According to them, the grenade which had exploded in the applicant's courtyard during the operation could have been thrown either by the applicant, his wife or a third person located outside the courtyard.
50. On 13 May 2013 the investigation was resumed with a view to submitting the applicant to a lie-detector test and identifying the person who had allegedly removed the bullet from the Kalashnikov's chamber after the operation had ended (see also paragraph 37 above).
51. On 13 June 2013 the investigation was again discontinued on the same grounds as before.
52. On 12 August 2013 the deputy prosecutor of Dagestan annulled the above decision as premature and unlawful, noting the investigators' failure to identify the person who had emptied the Kalashnikov's chamber. The investigation was resumed on 19 August 2013.
53. On unspecified dates before September 2013 the investigators questioned about twenty officers who had been involved in the special operation of 3 November 2006 and the applicant's neighbour, Mr N.G.
54. All of the officers gave general statements, in which they submitted that they had either not opened fire themselves or that they had not known who had opened it, or that they had returned fire on the applicant and his wife.
55. The applicant's neighbour, Mr N.G., submitted that the leader of an illegal armed group, Mr A.B., had been the applicant's friend and had stayed in the applicant's house on several occasions. According to the documents submitted, Mr N.G. had a history of mental illness, had been hospitalised for psychiatric care on several occasions and prior to his questioning in September 2013, on 16 April 2008, Mr N.G. had been deprived of his legal capacity by the Khasavyurt Town Court.
56. On 19 September 2013 the investigators discontinued the criminal proceedings for lack of *corpus delicti* in the actions of the police officers which had caused the applicant's injuries and his wife's death. They concluded that the applicant or his wife had attacked the service personnel, opening fire with the Kalashnikov and shouting *Allāhu akbar!* In response the service personnel had had to return fire to protect themselves. The fact that no cartridge cases from the Kalashnikov had been found might be explained by the narrow area of the crime scene that had been examined, which had not exceeded 6 or 7 metres in diameter, whereas the cartridge cases may be ejected out to up to 9.5

metres away from the Kalashnikov (see paragraph 36 above). The absence of gunshot residue on the applicant and his late wife might have been a result of the swabs having been taken belatedly (see paragraph 17 above). Lastly, the bullet from the Kalashnikov chamber might have been removed by an unidentified officer shortly after the operation as a safety measure (see paragraph 37 above). It is unclear when the applicant was informed of that decision.

E. Appeal against the decision to discontinue the proceedings

57. On 2 April 2014 the applicant and his relatives appealed against the decision of 19 September 2013 to the Sovetskiy District Court in Makhachkala, stating, in particular, that they had not been provided with information on the progress of the criminal case and that the circumstances of the incident, such as the absence of gunshot residue on the applicant and Ms Saniyat Magomedova and the empty chamber of the Kalashnikov showed that the police officers had opened fire unprovoked, killing Ms Magomedova and seriously wounding the applicant. Therefore, it was necessary to reopen the criminal case and take a number of steps, such as a ballistic expert examination of the locations of the police officers during the special operation. The Sovetskiy District Court dismissed the appeal on 23 June 2014. The court concluded that the impugned decision was lawful and well-founded.

58. On 2 July 2014 the applicant's relatives challenged the above decision before the Dagestan Supreme Court. The outcome of the proceedings is unknown.

II. RELEVANT DOMESTIC LAW

59. For a summary of relevant law and practice see *Tagayeva and Others v. Russia* (nos. 26562/07 and 6 others, § 465-66, 13 April 2017) and *Dalakov v. Russia* (no. 35152/09, §§ 51-53, 16 February 2016).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

60. The applicant complained under Article 2 of the Convention that his wife, Ms Saniyat Magomedova, had been killed and he had been seriously wounded during the special operation of 3 November 2006 because of a disproportionate use of lethal force by the police officers who had opened fire on them. He also alleged that the authorities had failed to conduct an effective investigation into the matter. Article 2 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. The parties' submissions

1. The Government

61. In their observations, the Government argued that the applicant had failed to exhaust domestic remedies, because he had not claimed compensation through civil proceedings for the damage caused by the officers.

62. The Government also alleged that the application had been lodged with the Court more than six months after the date on which the applicant ought to have become aware of the ineffectiveness of the investigations. They pointed out his passive attitude towards the investigation, particularly the fact that the appeal against the decision to discontinue the proceedings on 19 September 2013 had been introduced after a significant lapse of time, on 2 April 2014.

63. As to the merits of the case the Government submitted that the use of lethal force against the applicant and his wife had been justified and had met the criteria set out in *McCann and Others v. the United Kingdom* (27 September 1995, Series A no. 324) as the officers who had opened fire at them had genuinely believed that the applicant had been armed. The Government made no comments regarding the alleged ineffectiveness of the investigation.

2. The applicant

64. The applicant averred that the civil remedy mentioned by the Government was ineffective in the context of claims brought under Article 2 of the Convention.

65. He stated that he had become aware of the ineffectiveness of the investigation only on 13 June 2013, when the proceedings had been discontinued, and lodged the application with the Court within the six-month period which had started to run from that date.

66. As to the merits of the case the applicant noted that it had never been established that the use of force against him and his wife had been lawful. He submitted that his acquittal in respect of the attack on the police officers had proved that the use of force against him had been disproportionate. He also noted that the Kalashnikov found at the scene of the incident had had no bullets in its chamber, that no cartridge cases fired from that weapon had been found and that no gunshot residue had been detected on him or his late wife's body. Moreover, the special operation had not been duly supervised as they had been fired on without any warning or any order by the commanding officer. Neither the applicant nor his wife had been offered an opportunity to surrender.

67. The applicant listed a number of shortcomings of investigation into the incident. In particular, according to him, the investigation had been opened belatedly and its numerous suspensions had been premature. They had failed to identify the officers who had killed his wife and wounded him and to examine every firearm belonging to the operative unit's officers.

B. The Court's assessment

1. Admissibility

(a) Exhaustion of domestic remedies

68. The Court has already found in a number of similar cases that the civil remedy cited by the Government when taken alone cannot be regarded as an effective remedy in the context of the claims brought under Article 2 of the Convention (see *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, §§ 119-21, 24 February 2005, *Estamirov and Others v. Russia*, no. 60272/00, § 77, 12 October 2006). In the light of the above, the Court concludes that the applicant was not obliged to pursue a civil remedy. The Government's objection in this regard is thus dismissed.

(b) Compliance with the six-month rule

69. At the outset the Court notes that the killing of the applicant's wife and the wounding of the applicant took place during the same sequence of events and were the result of actions of the same group of police officers. The investigators were aware of the applicant's injuries and his wish that the perpetrators be prosecuted (see paragraph 24 above). Complaining of the ineffectiveness of the investigation the applicant and his father cited the investigators' inability to prosecute the police officers who had not only shot dead Ms Saniyat Magomedova but had also wounded the applicant (see paragraphs 29 and 48 above). Lastly, in the final decision to discontinue the proceedings on 19 September 2013 the investigators' assessment of the police officers' actions was made as a whole, without separating the applicant's wife's killing and the wounding of the applicant (see paragraph 56 above). Therefore, the Court finds that the applicant's compliance with the six-month requirement in respect of the killing and the wounding should be assessed as a whole (compare *Dudayeva v. Russia*, no. 67437/09, § 71, 8 December 2015).

70. In that connection the Court reiterates that where an applicant avails himself or herself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it may be appropriate for the purposes of Article 35 § 1 to take the start of the six-month period from the date when the applicant first became or ought to have become aware of those circumstances (see *Edwards v. the United Kingdom (dec.)*, no. 46477/99, 7 June 2001). Consequently, where a death has occurred, applicant relatives are expected to take steps to keep track of the investigation's progress, or lack thereof, and to lodge their applications with due expedition once they have become, or should have become, aware of the lack of any effective criminal investigation (see *Bulut and Yavuz v. Turkey (dec.)*, no. 73065/01, 28 May 2002, and *Bayram and Yıldırım v. Turkey (dec.)*, no. 38587/97, ECHR 2002-III). In *Varnava and Others v. Turkey ([GC]*, nos. 16064/90 and 8 others, § 162, ECHR 2009) the Court stated that in cases of unlawful or violent death, there was generally a precise point in time at which death was known to have occurred and some basic facts are in the public domain. The lack of progress or ineffectiveness of an investigation will generally be more readily apparent.

71. The Court considers that the applicant demonstrated sufficient diligence and did not unreasonably protract his application to the Court. Although the incident complained of took place on 3 November 2006, the criminal investigation into the killing of his wife was not opened until 8 June 2009 despite his endeavours to that effect (see paragraphs 24-28 above). Then the investigation was suspended, discontinued and resumed or reopened on several occasions without significant periods of inactivity on the part of the investigators. There was slow but steady progress in the

investigation. Even several years after the incident, the investigators took important steps: in 2010 they exhumed the applicant's wife's body and had a post-mortem examination carried out (see paragraphs 30 and 33 above). In 2012, they ordered a number of ballistic expert examinations and subjected several of the implicated police officers to lie-detector tests (see paragraphs 42, 43, 46 and 49 above). All those actions might have given the applicant hope of a positive outcome regarding the identification of the perpetrators and their prosecution. At the time of the lodging of the application with the Court – 24 July 2013 – the investigation was still ongoing. Therefore, it was not unreasonable that the applicant waited for about four years for the investigation to yield results.

72. In view of the aforementioned considerations, the Court dismisses the Government's objection based on the six-month time-limit.

(c) Other grounds of admissibility

73. The Court notes that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) General principles

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

(b) Application of those principles to the present case

75. It is common ground between the parties that the death of the applicant's wife, Ms Saniyat Magomedova, and the applicant's serious injuries resulted from the use of lethal force by State agents. The Court will firstly assess the adequacy of the investigation into the surrounding circumstances and it will then turn to the assessment of the actions of the State agents.

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

76. The Court notes with regret that the authorities opened criminal proceedings into the use of lethal force with such a significant delay. On 9 December 2006 and 8 February 2009 the Khasavyurt prosecutor's office refused to open a criminal case into the matter. The criminal case was eventually opened only on 8 June 2009, that is to say more than two and a half years after the incident (see paragraphs 25, 27 and 28 above).

77. Although the investigators did not remain idle in the course of the investigation, their activity lacked thoroughness and promptness. As is apparent from their own conclusions, owing to the narrow search area during the crime scene examination, they failed to find and collect the Kalashnikov cartridge cases. Furthermore, according to the investigators themselves, the swabs from the applicant and his late wife were taken belatedly (see paragraph 56 above). Moreover, it

appears that not every officer involved in the special operation was questioned and not all of their firearms were examined (see paragraphs 28 and 44 above).

78. As a result of the numerous shortcomings, the investigators failed to reconstruct the chain of the events leading to the application of lethal force and to establish the key elements of the incident. For example, they failed to identify the individual armed with the Kalashnikov (it remained unclear whether it had been the applicant or his wife), the individual who had thrown the grenade and the officer who had allegedly removed the bullet from the chamber of the Kalashnikov. The Court finds such an outcome unsatisfactory, regard being to the fact that there was video footage of the special operation, which, contrary to the superior investigators' orders, has apparently never been examined (see paragraph 40 above); that the incident took place in the presence of a number of witnesses, all of whom had been law-enforcement agents and should have paid particular attention to what have been happening during the special operation.

79. Moreover, in the Court's view, the investigators failed to explain the contradiction between the officers' submissions about the alleged attack on them and the lack of fingerprints on the Kalashnikov, the absence of a bullet in its chamber, the absence of cartridge cases shot from the Kalashnikov, or the absence of gunshot residue on the swabs from the applicant and his wife. The explanation proposed by the investigators was based on the improbable claim that owing to a combination of various factors all of the key evidence of the attack on the officers had been lost. The only material evidence of the alleged gunfire attack by the applicant and his wife – bullet traces on the shed roof which, according to the experts, might have been caused by gunshots from their location on the ground – is insufficient to support the investigators' version. The Court subscribes to the conclusion by the domestic court in the applicant's case that the attack of the applicant or his wife on the police officers had not been proved (see paragraph 22 above)

80. As regards the manner in which the investigation was conducted, the Court cannot overlook that it was suspended, discontinued and then resumed and reopened on many occasions (see paragraphs 28, 31, 32, 35, 40, 41, 44, 50-52 and 56 above). Such premature suspensions and terminations of the criminal proceedings in a situation in which vital steps indicated by the superior authority had not been taken obviously undermined the investigators' ability to identify and prosecute the perpetrators (see *Ögur v. Turkey* [GC], no. 21954/93, § 88, ECHR 1999-III, and *Khava Aziyeva and Others v. Russia*, no. 30237/10, § 86, 23 April 2015).

81. In the light of the above, and taking into account that the ineffectiveness of the investigation was not disputed by the Government, the Court concludes that the domestic authorities had failed to demonstrate a proper response to the serious allegations of inappropriate use of lethal force by agents of the State. By failing in its duty to carry out an effective investigation, the State fostered its agents' sense of impunity. The Court stresses that a proper response by the authorities in investigating serious allegations of use of lethal force by agents of the State in compliance with Article 2 of the Convention standards is essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion or tolerance of unlawful acts (see, among other authorities, *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 108, 4 May 2001, and *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 167, ECHR 2011).

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

(ii) Responsibility of the State for the death of Ms Saniyat Magomedova and the applicant's injuries

83. The Court notes that it is common ground between the parties that the applicant's wife was shot dead and the applicant was seriously wounded on 3 November 2006 as a result of the special operation carried out by State agents. However, the parties disagreed on whether the applicant's and his wife's actions necessitated the use of lethal force against them.

84. It is impossible to answer that question without establishing the factual circumstances of the incident, specifically, the conduct of the applicant and his wife prior to the fatal shooting.

85. The Court notes that without disputing the applicant's statement that neither he nor his wife had been armed on 3 November 2006, the Government submitted that the police officers "subjectively believed" that the victims of their attack had opened fire at them. The domestic investigation established that either the applicant or his wife had opened fire on the police officers, who had to protect themselves by shooting back.

86. The Court cannot subscribe to the latter finding as it has already concluded that the investigation undertaken by the authorities, including the way in which the facts in question were established, was not adequate or effective (see paragraph 81 above). Taking into account that the authorities failed to provide a reasonable explanation as to the absence of fingerprints on the Kalashnikov, its empty chamber, the lack of gunpowder residue on the applicant and his wife, and the lack of cartridge cases from the Kalashnikov bullets at the scene of the incident, the Court finds it established that neither the applicant nor his wife fired at the police officers. Regard being had to the scarce and contradictory material in its possession, its subsidiary role and the complexity of the issue, the Court will leave the question as to whether the applicant or his wife had been armed open.

87. The Court will now turn to the determination as to whether the way in which the special operation was conducted showed that the police officers had taken appropriate care to ensure that any risk to the life of the applicant and his wife was kept to a minimum. In carrying out its assessment of the planning and control phase of the operation from the standpoint of Article 2 of the Convention the Court must have particular regard to the context in which the incident occurred as well as to the way in which the situation developed (see *Andronicou and Constantinou v. Cyprus*, 9 October 1997, § 182, Reports of Judgments and Decisions 1997-VI).

88. First of all, the Court notes that the special operation was not spontaneous. It was planned in advance, on 2 November 2006, and the officers arrived at the applicant's house at least one hour before it started (see paragraphs 6 and 9 above). The officers were well-equipped and were intending to arrest one man, Mr A.B. However, there is nothing in the documents reviewed by the Court to suggest that any serious consideration was devoted at the planning stage of the operation to the possibility that the suspect might try to escape or that the applicant or his family could assist him in that (see paragraphs 6 and 8 above).

89. By the time the applicant and his wife stepped out of the house the officers had already taken their places in the ambush. They monitored the house and ought to have been ready for the developments which followed. However, as soon as the applicant and his wife moved several steps away from the house, the officers opened fire, intensively shooting off more than sixty rounds in a chaotic fashion at them without any order to open fire having been given (see paragraph 11 above). No precautions were taken by the State agents with a view to safeguarding the lives of Ms Saniyat

Magomedova or the applicant. They were neither offered a chance to surrender nor were warning shots fired in the air by the officers (contrast *Oláh v. Hungary* (dec.), no. 56558/00, 14 September 2004). The applicant and his wife were shot several times in a situation where there was no immediate threat to the safety of the officers shooting from cover. The Court finds that such conduct by State agents could not be justified.

90. In the light of the foregoing, the Court concludes that the Government have failed to demonstrate that the resort to lethal force against Ms Saniyat Magomedova and the applicant was absolutely necessary. It cannot conclude that the use of such force by service personnel was based on an honest belief which was perceived, for good reasons, to be valid at the time (see *Akhmadov and Others v. Russia*, no. 21586/02, § 101, 14 November 2008, and *Suleymanova v. Russia*, no. 9191/06, § 85, 12 May 2010; see, by contrast, *McCann and Others v. the United Kingdom*, 27 September 1995, § 200, Series A no. 324).

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

92. 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

93. The applicant claimed just satisfaction in respect of non-pecuniary damage in an amount to be determined by the Court.

94. The Government left the issue to the Court’s discretion.

95. The Court awards the applicant 80,000 euros (EUR) in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

96. The applicant also claimed EUR 2,603 for the costs and expenses incurred before the domestic authorities and the Court. He asked for the award to be transferred into the bank account of his representative.

97. The Government left the issue to the Court’s discretion.

98. Regard being had to the documents in its possession and to its case-law, the Court considers it reasonable to award the sum of EUR 2,000, plus any tax that may be chargeable, covering costs and expenses under all heads. The award is to be transferred into the applicant’s current representative’s bank account as indicated by the applicant.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. Declares the complaints under procedural and substantive limbs of Article 2 of the Convention admissible;
2. Holds that there has been a procedural violation of Article 2 of the Convention on account of the investigators' failure to conduct an effective investigation into the circumstances in which Ms Saniyat Magomedova was killed and the applicant was wounded;
3. Holds that there has been a substantive violation of Article 2 of the Convention in respect of Ms Saniyat Magomedova and the applicant;
4. Holds

(a) that the respondent State is to pay the applicant, within three months the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

- (i) EUR 80,000 (eighty thousand euros), plus any tax that may be chargeable to the applicant, in respect of non-pecuniary damage;
- (ii) EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses. The award is to be paid into the bank account of the applicant's current representative, Stichting Russian Justice Initiative, as indicated by the applicant;

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

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

Done in English, and notified in writing on 4 February 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Alena Poláčková
President