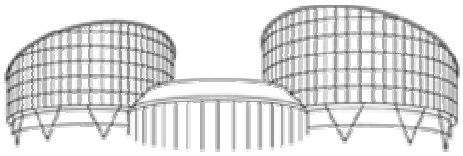

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF BAJSULTANOV v. AUSTRIA

(Application no. 54131/10)

JUDGMENT

STRASBOURG

12 June 2012

FINAL

22/10/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Bajsultanov v. Austria**,**

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

Nina Vajić, *President,*
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Erik Møse, *judges,*

and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 22 May 2012,

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

PROCEDURE

1. The case originated in an application (no. 54131/10) against the Republic of Austria 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 Ruslan Bajsultanov ("the applicant"), on 16 September 2010.

2. The applicant was represented by Mr K. Kocher, a lawyer practising in Graz. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. The applicant alleged that the lifting of the asylum status in Austria and the planned expulsion to the Russian Federation would subject him to a real risk of ill-treatment within the meaning of Article 3 and would separate him from his wife and two children, who have independent asylum status in Austria.

4. On 23 September 2010 the Court decided to apply Rule 39 of the Rules of Court indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings not to expel the applicant until further notice.

5. On 28 January 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

6. On 25 May 2011, the Russian Government informed the Court that they would not exercise their right to intervene in the proceedings.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant, a Russian national of Chechen origin, was born in 1980 and lives in Graz.

A. The asylum proceedings

8. The applicant arrived in Austria with his family on 25 July 2003 and lodged an asylum request on the same day.

9. The applicant was raised in Urus-Martan and in the Naur District in Chechnya and went to school there for seven years. He did not have any vocational training, but worked subsequently in different jobs.

10. The applicant's wife was born in Grozny and spent all her life in Chechnya, where she married the applicant in 2002 in a religious ceremony.

11. With regard to his reasons to apply for asylum, the applicant claimed that he had supported the Chechen fighters during the first war from 1994 until 1996. Because he did not feel that his support had been sufficiently acknowledged, he did not take part in the second war in Chechnya. In summer 2003, mercenary soldiers came looking for him during a "cleaning operation" based on a file about the applicant that had been created after the first war. When they did not find him at home, the soldiers beat up the applicant's father. Later on, the family's house was burned down. Thereupon, the applicant's father advised the applicant and his wife to leave Chechnya and the Russian Federation.

12. On 24 November 2004, the Federal Asylum Office (*Bundesasylamt*) dismissed the applicant's asylum request and declared the applicant's expulsion to the Russian Federation permissible.

13. The applicant appealed. On 22 July 2005, the Independent Federal Asylum Panel (*Unabhängiger Bundesasylsenat*) allowed the applicant's appeal and awarded him asylum status. Referring to relevant country reports it found that the security situation in Chechnya had deteriorated from May 2004 onwards and that numerous killings and unexplained disappearances occurred on a regular basis, many within the context of "cleaning operations". It further found the humanitarian situation in Chechnya to be critical. Finally, it stated that there were no domestic alternatives, due to systematic hindrances encountered by Chechens with Russian authorities throughout the country and also due to difficulties in obtaining registration and settling in other parts of Russia. It found the applicant's statements to be credible and sufficiently substantiated and concluded that the applicant was at a real risk of being subjected to ill-treatment if he returned to the Russian Federation.

14. On 27 April 2007, the Independent Federal Asylum Panel also granted asylum to the applicant's wife. It reasoned that since the applicant was wanted in Russia because of his alleged hostility towards the Russian authorities, his wife was also at real risk of ill-treatment if she returned to Russia. It also noted that the applicant had been awarded the status of a recognised refugee and that the family would not be able to establish their life together in another country. Ruling out a domestic alternative (moving to live elsewhere in Russia), it concluded that the applicant's wife therefore should be awarded asylum status in application of the principle *in dubio pro fugitivo*.

15. The applicant's daughter, who was born in 2004, was granted asylum on 15 May 2007; and his son, born in 2007, was granted asylum on 21 June 2007.

B. The applicant's criminal convictions

16. On 28 April 2005, the Graz District Court (*Bezirksgericht Graz*) convicted the applicant of attempted theft and sentenced him to two weeks' imprisonment, suspended, and placed him on probation.

17. On 17 August 2006, the Leoben Regional Court (*Landesgericht Leoben*) convicted the applicant of attempted resistance to public authority, aggravated damage to property and aggravated bodily harm, and sentenced him to eight months' imprisonment, six of which were suspended, and placed him on probation for three years.

18. On 10 March 2008, the Graz Regional Court (*Landesgericht Graz*) convicted the applicant of partly attempted and partly actual aggravated bodily harm, and sentenced him to twelve months' imprisonment, while quashing the probation order in the previous

sentence. The applicant was found to have hit a prostitute on the head with an empty bottle because she had not told him that she was suffering from a sexually transmitted disease.

19. The applicant served his sentences and was released again in August 2009. Since then, the applicant has been living with his wife and two children in an apartment in Graz.

C. The lifting of the asylum status

20. The Federal Asylum Office initiated proceedings to lift the applicant's asylum status. In the interview conducted in the course of the proceedings, the applicant stated that he could not return to Chechnya because of his past and that he was convinced that he would be killed if he returned. He claimed that many people had returned to Chechnya after being informed that they would no longer be in danger of persecution in Chechnya, but had then disappeared or been killed by the security service of the Chechen president. He could not prove this, since the people concerned were dead. Furthermore, the applicant's father had told him that he should not return to Chechnya and that he was still at risk of persecution.

21. On 2 October 2008 the Federal Asylum Office lifted the applicant's asylum status and ordered his expulsion to the Russian Federation. Referring to section 7 of the 2005 Asylum Act, it noted that asylum status could be lifted after conviction by a domestic court of a particularly serious offence. It further referred to the four criteria developed by the Administrative Court (*Verwaltungsgerichtshof*) that were as follows: firstly, the conviction must be for a particularly serious crime, such as murder, rape, child abuse, arson, armed robbery, drug trafficking, or similar crimes. Secondly, it must be a final conviction. Furthermore, the offence committed must be especially dangerous (*gemeingefährlich*); and finally, the public interest in lifting the asylum status must outweigh the applicant's interest in the protection provided by the asylum status. The Federal Asylum Office continued by finding that in practice, offences against physical integrity and life would be qualified as "particularly serious crimes". It also made reference to the United Nations Convention 1951 relating to the Status of Refugees that requested a balancing of the interests involved. In conclusion, it stated that the applicant had been convicted more than once of offences against physical integrity, and that he had reoffended after his first conviction.

22. It further found that the security situation in Chechnya had improved since the applicant had been awarded asylum status, and came to the conclusion that the applicant would not be subject to a real risk of ill-treatment contrary to Article 3 of the Convention upon a return to the Russian Federation. As regards the applicant's rights under Article 8 of the Convention, the Federal Asylum Office stated that the applicant had not taken any serious steps towards integration into Austrian society since the award of asylum status. He had for example only started learning German in 2007, when he had already been in the country for four years. With regard to the applicant's family, it questioned its entitlement to protection, in the context of the violent offences the applicant had committed in the past. It referred also to the applicant's family still living in Chechnya, namely his parents and six siblings, with whom the applicant maintained regular telephone contact and who constituted a clear link between the applicant and Chechnya, and concluded that the public interest, in view of the applicant's criminal record, outweighed his interests in respect of his family life.

23. The applicant appealed against that decision. On 2 June 2009 the Asylum Court (*Asylgerichtshof*) held an oral hearing, at which the applicant repeated that he could not return to Chechnya. In general, his family had no problems with the security services there. His father had been visited by a member of the FSB two weeks after the applicant had left the country and had been told that his family should not expect any problems with the authorities, as they were only looking for the applicant. The applicant's wife was also interviewed. Asked about her relationship with the applicant, she confirmed that she visited

the applicant regularly in detention and that they would naturally continue to live together as a family as soon as the applicant was released from prison.

24. On 24 August 2009 the Asylum Court dismissed the applicant's appeal as unfounded.

25. As regards the general security and political situation in Chechnya, and referring to relevant country reports, it found that military activities had decreased significantly in recent years and that the second war had ended officially on 16 April 2009. However, a country report by the German Federal Foreign Office dated 22 November 2008 showed that there were still massive human rights violations occurring in Chechnya under Ramsan Kadyrov's dictatorship. Furthermore, the reports generally conceded that the civilian population was still the victim of "cleaning" operations, but also that unexplained disappearances had decreased since 2007. The Asylum Court considered torture still to be a problem in the region. Referring to reports of the Office of the United Nations High Commissioner for Refugees, it found people particularly targeted for persecution to be (former) rebels, their relatives, political adversaries of Ramsan Kadyrov, human rights activists, and people who had lodged complaints with international organisations. It further stated that the Office of the United Nations High Commissioner for Refugees still dismissed any domestic opportunity for Chechens in the Russian Federation. However, it also referred to a Swiss practice that declared a domestic alternative elsewhere in the Russian Federation acceptable for Chechens.

26. In its legal reasoning the Asylum Court stated that asylum status could be lifted if the person was convicted by a domestic court of a particularly serious offence, if he therefore presented a danger to the community, and if the public interest outweighed the person's private interests. It referred to the Administrative Court's illustration of German practice, which is to qualify a particularly serious offence as one with a sentence of at least three years' imprisonment, but called it a "flexible system". With regard to the applicant, the Asylum Court found that his repeated offences were of a very serious and violent nature. Finally, it emphasised the applicant's lack of integration in Austria and the poor prospects for his future development.

27. The Asylum Court continued by examining the possibility of subsidiary protection pursuant to section 8 of the 2005 Asylum Act. In that context it found that the civil war in Chechnya had ended and that there was no general risk of treatment contrary to Article 3 of the Convention in the event of expulsion to the Russian Federation. Further referring to the applicant's "minor" role in the first war, the stable life situation of his family in Chechnya and his good prospects of work in Chechnya, the Asylum Court dismissed a real and individual risk of persecution within the meaning of Article 3 of the Convention in relation to the applicant. Finally, examining the applicant's rights under Article 8 of the Convention with regard to his expulsion, as foreseen in section 10 § 2(2) of the 2005 Asylum Act, it found that the applicant still had strong ties with Chechnya, and that his children were of a young and adaptable age.

28. On 1 December 2009, the Constitutional Court (*Verfassungsgerichtshof*) dismissed the applicant's application for legal aid to lodge a complaint against the appeal decision of the Asylum Court, due to lack of prospects of success. The applicant nevertheless lodged a complaint and on 11 March 2010, the Constitutional Court refused to deal with the complaint.

29. That decision was served on the applicant's counsel on 16 March 2010.

D. The application of Rule 39 of the Rules of Court

30. On 16 September 2010 the applicant lodged a complaint with the European Court of Human Rights and requested the application of an interim measure pursuant to Rule 39 of the Rules of Court.

31. On 23 September 2010, the Court applied the interim measure under Rule 39 and requested the Austrian Government to stay the applicant's expulsion to the Russian Federation until further notice.

E. The ten-year exclusion order

32. On 7 September 2010 the Graz Federal Police Authority (*Bundespolizeidirektion Graz*) issued an exclusion order against the applicant for a period of ten years. Complaint proceedings are pending with the Administrative Court (*Verwaltungsgerichtshof*).

II. RELEVANT LAW AND PRACTICE

A. Domestic law and practice

1. Jurisprudence of the Administrative Court

33. In 1999, the Administrative Court examined Article 33(2) of the United Nations Convention 1951 relating to the Status of Refugees ("the 1951 Convention") and stated that four conditions needed to be fulfilled cumulatively to allow for the expulsion of a refugee, despite a real risk of persecution: the refugee must have committed a particularly serious offence; his or her conviction must be final; the refugee must be especially dangerous; lastly the public interest in the refugee's expulsion must outweigh the refugee's interests for protection in the state granting asylum status (see judgment of the Austrian Administrative Court of 6 October 1999, no. 99/01/0288).

34. In a subsequent judgment, the Administrative Court analysed the condition of a "particularly serious offence" in view of international law and academic writing and stated as therein used definitions that it needed to be a "capital crime or particularly grave offence" that was "objectively and subjectively particularly serious". It further referred to academic sources that claimed that Article 33(2) of the 1951 Convention was only "meant to be applied on extremely rare occasions" and as an "*ultima ratio*" that needed to be interpreted restrictively. Finally, the Administrative Court added for illustration that Germany used as a landmark for the application of Article 33(2) of the 1951 Convention the condition of a sentence of at least three years' imprisonment (see judgment of the Austrian Administrative Court of 3 December 2002, no. 99/01/0449).

2. The 2005 Asylum Act

35. The Austrian 2005 Asylum Act provides that a foreigner is excluded from the award of asylum status if he or she has been convicted of a particularly serious offence, if that conviction was final, and if the foreigner presented a danger to society due to his or her criminal conduct. For the same reasons, it is lawful to lift an asylum status (see sections 6 § 1(4) and 7 § 1(1) of the 2005 Asylum Act).

36. If an asylum request is either dismissed or lifted, an asylum seeker can still be awarded subsidiary protection under section 8 of the 2005 Asylum Act if his or her expulsion, deportation or extradition constitutes a real risk of a violation of Articles 2 and 3 of the Convention.

37. In the event that an asylum request is dismissed or an asylum status lifted, the authority is obliged to declare at the same time that expulsion is permissible. However, it is not allowed to expel a person even pursuant to a negative asylum decision, if an expulsion would constitute a violation of Article 8 of the Convention (see sections 10 § 1 and 10 § 2(2) of the Asylum Act).

B. Relevant international information

1. *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe following his visit to the Russian Federation from 12 to 21 May 2011, dated 6 September 2011*

38. The main aim of that visit of the Council of Europe Commissioner for Human Rights was to review the human rights situation in the North Caucasus in the context of the regular field visits that the Commissioner Hammarberg, like his predecessor, conducted. The report noted that since the Commissioner's previous visit in 2009, there had been an increased emphasis on the socio-economic development of the North Caucasus Federal District, and the implementation of a strategy aiming to improve the investment climate, fight corruption and address unemployment was ongoing. Despite these positive steps to improve the quality of life of the people living in the region, the situation in the North Caucasus continued to present major challenges for the protection of human rights. The Commissioner defined as some of the most serious problems in terms of the protection of human rights in the republics visited the issues of counter-terrorism measures, of abductions, disappearances and ill-treatment, of combating impunity and of the situation of human rights defenders. The report included the Commissioner's observations and recommendations in relation to those topics.

39. With regard to counter-terrorism measures, the report concluded that the continuing challenges to security in the North Caucasus amounted to a major ongoing crisis, with consequences which extend beyond the region. While state authorities had a clear duty to protect the public from terrorism and the actions of illegal armed groups, counter-terrorism measures should be carried out in full compliance with human rights norms (see paragraph 33 of the report).

40. The Commissioner was further deeply concerned by the persistence of allegations and other information relating to abductions, disappearances and ill-treatment of people deprived of their liberty in the North Caucasus. While the number of abductions and disappearances in Chechnya might have decreased in the more recent period compared to 2009, the situation remained far from normal. Referring to the far-reaching effects of disappearances on a society as a whole, he supported the proposal of the Presidential Council for Civil Society Institutions and Human Rights for creating an interdepartmental federal commission to determine the fate of persons who have gone missing during the entire period of counter-terrorism operations in the North Caucasus. The Commissioner further emphasised the importance of the systematic application in practice of rules against the wearing of masks or non-standard uniforms without badges as well as against the use of unmarked vehicles in the course of investigative activities. He also encouraged a wide spread dissemination of all reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment among all stakeholders and reiterated the principle that evidence obtained through ill-treatment or other unlawful means should be treated as inadmissible in criminal proceedings (see paragraphs 48 et seq. of the report).

41. The Commissioner went on by stating that the persistent patterns of impunity for serious human rights violations were among the most intractable problems of the North Caucasus and remained a source of major concern to him. There have certainly been a number of positive steps, such as the establishment of the Investigating Committee

structures, the increased support for victim participation in criminal proceedings, and the promulgation of various directives such as the Guidelines of the Supreme Court on victim participation and the instructions of the Prosecutor General and the Investigative Committee regarding the conduct of investigations. Despite these measures of a systemic, legislative and regulatory nature, the information gathered during the visit had led the Commissioner to conclude that the situation remained essentially unchanged in practice since his previous visit in September 2009. He emphasised the importance of effective investigations of possible violations by State actors of the right to life and the prohibition against torture and ill-treatment and called on the Russian leadership to deliver the unequivocal message that impunity would no longer be tolerated to help in creating the requisite determination on the part of the investigators concerned (see paragraphs 65 et seq. of the report).

42. As a conclusion for his fourth and last topic, the Commissioner stated that human rights activists continued to face serious obstacles in their work and could be exposed to significant risks. In settings which present considerable challenges to the protection of human rights, it was all the more important to ensure that those persons and organisations which engage in human rights monitoring activities were able to go about their work freely and without undue impediments (see paragraph 80 of the report).

2. 2010 Human Rights Report on Russia of the United States Department of State dated 8 April 2011

43. Under the heading “Use of excessive force and other abuses in internal conflicts”, the Human Rights Report on Russia of the United States Department of State of 8 April 2011 stated that violence continued to spread in the North Caucasus republics, driven by separatism, inter-ethnic conflicts, jihadist movements, vendettas, criminality, and excesses by security forces. However, Chechnya saw a decrease in violence from the previous year. Government personnel, rebels and criminal elements continued also to engage in abductions in the North Caucasus. Officials and observers disagreed on the number of victims. Human rights groups believed the number of abductions was under-reported due to the reluctance of victims’ relatives to complain to the authorities for fear of reprisals. According to a report on the website Caucasian Knot, during the year approximately fifty people were kidnapped or unlawfully detained by armed parties in the North Caucasus, and only sixteen were freed. Allegedly, there was no accountability for government forces involved in abductions. There were continued reports that abductions were followed by beatings or torture to extract confessions and that abductions were conducted for political reasons. Security forces under the command of Chechen President Kadyrov allegedly played a significant role in abductions, either on their own initiative or in joint operations with federal forces. Human rights groups reported these forces were frequently suspected of being responsible for disappearances and abductions, including those of family members of rebel commanders and fighters.

44. Armed forces and police units reportedly frequently abused and tortured people in holding facilities where federal authorities dealt with rebels and people suspected of aiding them. In Chechnya and Ingushetia there continued to be reports of torture by government forces. There was also a report of a continued arson campaign. The Chechen arson campaign began in 2008, following explicit threats by Chechen President Kadyrov and Grozny Mayor Muslim Khuchiyev to burn down houses belonging to families whose sons were suspected of joining the insurgency. Human rights activist Natalya Estemirova was working on a documentary on the arson campaign when she was killed in 2009.

3. Schweizerische Flüchtlingshilfe (Swiss Refugee Council): North Caucasus: Security and human rights, dated 12 September 2011

45. With regard to the overall security situation, the Swiss Refugee Council report of 12 September 2011 stated that general violence increased in 2010 in Chechnya, Dagestan and Ingushetia. Even though the number of people killed decreased, the number of injured civilians increased, which showed that civilians were affected more and more by the armed conflict between the security services and the rebels. The Russian President Medvedev was quoted as saying on 19 November 2010 that the situation in the North Caucasus had not in practice improved. The widespread impunity further encouraged the arbitrariness exercised by the security services (see page 5 of the report).

46. The main human rights violations happened by way of arbitrary detention to obtain confessions and information about rebels, torture and ill-treatment in secret detention centres, kidnappings and disappearances executed by members of federal and local security services and criminal groups for ransom, executions, the arson campaign targeting family members of alleged rebels, and lack of financial compensation, for example for burned houses and property. Those most at risk belonged to the following groups: NGO and human rights activists; victims, their lawyers, witnesses and their families; journalists; government opponents and returnees from abroad and their relatives. The report noted that returnees from abroad were generally immediately detained, questioned about their stay abroad and sometimes tortured. The questioning did not necessarily stop after their release from detention. Returnees and their relatives had to expect arbitrary detention at any time. In individual cases, criminal suspicions were invented so that returners could be ill-treated as a form of punishment for leaving Chechnya in the first place (see pages 10 to 17 of the report).

4. Chechens in the Russian Federation: Report from the Danish Immigration Service's fact-finding mission to Moscow and St. Petersburg from 12 to 29 June 2011, dated October 2011

47. Relying on statistical data provided by the Memorial NGO, the report from the Danish Immigration Service of October 2011 showed that the year 2008 saw a return to the old tactics of abductions and disappearances, and the number of abducted people again increased in 2009 to ninety-three recorded cases. Furthermore, the number of punitive house burnings increased dramatically. Newer data were not available, since Memorial's work was severely hampered due to Natalya Estemirova's abduction and killing in 2009 and the subsequent suspension of the organisation's work for six months. However, Human Rights Watch reported fewer human rights violations in Chechnya in 2010 and early 2011. Both NGOs stated that after Estemirova's death it had become increasingly difficult to obtain reliable information about the security situation in Chechnya and that victims of beatings, threats and detention had become increasingly afraid to report those incidents to NGOs or official investigation authorities (see pages 52 to 54 of the report).

48. As particular groups at risk of being exposed to torture, disappearances, kidnappings and extrajudicial killings the report enumerated members of rebel groups and any person suspected of supporting or sympathising with these groups; relatives and friends of supporters or sympathisers of rebel groups; young, healthy men; young women; persons who lodge complaints with the Prosecutor's Office, NGOs or the European Court of Human Rights and returnees from abroad. With regard to the last-mentioned group, there were reports that people returning from abroad were stopped by law-enforcement officials who requested money or kidnappings for ransom of returnees. They further risked being suspected of holding information about anti-Kadyrov elements of the Chechen diaspora in Western European countries and were often interrogated on their return to Chechnya. A returnee would need to explicitly unite with the government and Kadyrov's policies (see pages 56 et seq. of the report). On the other hand, the International Organization for

Migration ("the IOM") in Russia reported on voluntary returns to Chechnya which were considered a success. In 2010 the IOM assisted approximately 2,000 returns to the North Caucasus. The IOM conducted regular visits to Chechnya and met returnees there. The organisation conceded however that it was difficult to assess the situation in Chechnya on such short visits. It was also emphasised that the number of returnees in a particular IOM project might be too low to fully reflect the situation of returnees in general (see pages 62 et seq. of the report).

49. With regard to the risk to former members of the illegal armed groups, the report quoted an anonymous Western embassy source stating that active participants in the fighting against the Russian federal army in 1994-96 who have not since been militarily active or in opposition to Kadyrov's regime were not at risk of being persecuted by the present Chechen authorities (see page 62 of the report).

5. Guidelines on the treatment of Chechen internally displaced persons, asylum seekers and refugees in Europe by the European Council on Refugees and Exiles (ECRE), updated in March 2011

50. With regard to Chechens returning from other countries, the ECRE Guidelines of March 2011 stated that upon their return they were often suspected of either being involved in illegal armed groups, or at the very least of having significant resources. They encountered suspicion, became victims of extortion and had criminal cases fabricated against them. Returnees were reportedly called to meetings with the Federal Security Services and the Ministry of the Interior, where they were questioned, often with threats and ill-treatment and demands for payment. Young men especially were made to collaborate with the security services. Those who spoke out about the regime were most at risk, for example applicants to the European Court of Human Rights, as well as those who appealed to national courts, federal authorities or NGOs (see pages 54 et seq. of the report).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

51. The applicant complained that expulsion to the Russian Federation would subject him to a real risk of ill-treatment contrary 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. Admissibility

52. The Government submitted that the application form did not indicate whether the application was lodged with the Court within the time-limit set out in Article 35 § 1 of the Convention.

53. The Court notes that the final decision taken with regard to the present application was served on the applicant's counsel on 16 March 2010. The six-month period of Article 35 § 1 of the Convention thus started to run on the next day and expired on 16 September 2010 (see for the calculation of the six-month period for example *Otto v. Germany* (dec.), no. 21425/06, 10 November 2009). The application form was duly signed and dated by the applicant's counsel on 16 September 2010 and posted on the same day, according to the postmark.

54. The Court is therefore satisfied that the application was lodged with the Court within the six-month period (see, *a contrario, Arslan v. Turkey* (dec.), no. 36747/02, ECHR 2002-

X). It further notes that the 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.

B. Merits

1. Submissions by the parties

55. The applicant claimed that the Austrian authorities had not sufficiently thoroughly examined the question of whether he would be at a real risk of being subjected to treatment contrary to Article 3 if returned to Chechnya. The country reports consulted had shown that there were still grave human rights violations in Chechnya and that the security services very often resorted to violence and abuse. Rebels, or people considered rebels or friends of rebels, were at risk of being detained, of disappearing and/or of being tortured. However, the Austrian authorities had not drawn the right conclusions on the basis of those reports and the original reasons for the applicant's flight when they allowed his asylum status to be lifted.

56. Furthermore, the applicant submitted that the Austrian authorities had not properly applied the Administrative Court's case-law regarding the definition of a "particularly serious offence". He considered that the convictions on which the proceedings to lift his asylum status were based did not fall within the category of a "particularly serious offence".

57. The Government contested those submissions and submitted firstly that it was for the applicant to provide the necessary information to allow the examination of an individual and actual risk of that individual's being subjected to ill-treatment if expelled, as required by the Court's case-law. They referred to *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 366, 21 January 2011, and *Saadi v. Italy* [GC], no. 37201/06, §§ 128-29, ECHR 2008. The Government asserted that the applicant only repeated his original reasons for leaving Russia in the proceedings concerning the lifting of his asylum status, but did not submit any information or evidence that showed that the risk was currently still relevant.

58. The Government further stated that the decisions of the domestic authorities had been based on extensive country reports and documentations which allowed them to evaluate the current situation in relevant countries of origins. With regard to the applicant, they reiterated that the applicant could no longer be considered to fall within a group at risk of persecution, because of the further passage of time, even though he had submitted credible and valid reasons for leaving Russia in the original asylum proceedings. The authorities had therefore thoroughly and carefully examined the applicant's real risk of being subjected to ill-treatment if he returned to the Russian Federation.

59. Furthermore, both authorities, the Federal Asylum Office and the Asylum Court, examined in detail the conditions necessary for the lifting of the asylum status. They had, after careful evaluation, rightly concluded that offences directed against the life and physical integrity of another person must be considered "particularly serious offences", and further took into account the fact that the applicant had reoffended.

2. The Court's assessment

(a) General principles

60. It is the Court's settled case-law that as a matter of well-established international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States have the right to control the entry, residence and removal of aliens (see, among many other authorities, *Hila v. the United Kingdom*, no. 45276/99, § 59, ECHR 2001-II, and *Saadi,* cited above, § 124). In addition, neither the Convention nor its Protocols confers the right to political asylum (see *Vilvarajah and Others v. the United Kingdom*, 30

October 1991, § 102, Series A no. 215, and *Ahmed v. Austria*, 17 December 1996, § 38, *Reports of Judgments and Decisions* 1996-VI).

61. However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 implies an obligation not to deport the person in question to that country (see *Soerin v. the United Kingdom*, 7 July 1989, §§ 90-91, Series A no. 161; *Ahmed*, cited above, § 39; *Chahal v. the United Kingdom*, 15 November 1996, § 80, *Reports* 1996-V; and *Saadi,* cited above, § 25).

62. In order to determine whether there is a real risk of ill-treatment in any given case, the Court must examine the foreseeable consequences of sending an applicant to the country of destination, bearing in mind the general situation there and his personal circumstances (see *Vilvarajah and Others,* cited above, § 108 *in fine*). It will do so by assessing the issue in the light of all material placed before it, or, if necessary, material obtained *proprio motu* (see *H.L.R. v. France*, 29 April 1997, § 37, *Reports* 1997-III, and, more recently, *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 116, 23 February 2012). It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *Saadi,* cited above, § 129). The mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3, and where the sources available to the Court describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence (see again *Saadi,* cited above, § 131, with references to further settled case-law of the Court).

63. If an applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court (see *Saadi,* cited above, § 133). A full and *ex nunc* assessment is called for as the situation in a country of destination may change over the course of time. Even though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive, and it is therefore necessary to take into account information that has come to light since the final decision taken by the domestic authorities (see *Salah Sheekh v. the Netherlands*, no. 1948/04, § 136, ECHR 2007-I (extracts)).

(b) Application of the above principles to the present case

64. The Court acknowledges the fact that in 2005, the Austrian authorities considered the applicant's reasons for leaving Russia to be credible and to provide sufficient grounds for them to grant him asylum in Austria. Furthermore, the Court finds that the country reports consulted by the Austrian authorities, especially by the Asylum Court, still reflect a situation of danger and arbitrary abuse, notably with regard to certain categories of people, such as (former) rebels, their relatives, political adversaries of Ramsan Kadyrov, human rights activists, and individuals who have lodged complaints with international organisations. Furthermore, the Court does not underestimate the more recent information on the human rights and security situation in Chechnya that still indicates occurrences of arbitrary violence, of disappearances, impunity and ill-treatment in (secret) detention facilities. The Court is also aware of the reported interrogations of returnees and of harassment and possible detention and ill-treatment by the Federal Security Service or local law-enforcement officials and also by criminal organisations.

65. However, turning to the applicant's personal circumstances, the Court notes that the applicant had acted in a supporting role during the first war, which ended in 1996. He had not taken any part in the second war in Chechnya. The Court thus finds that considerable time has passed since the first Chechen war. In this context, the Court refers to the report of

the Danish Immigration Service's fact-finding mission, which stated that even active participants in the first war were not at risk of being persecuted by the present Chechen authorities (see paragraph 49 above).

66. The Court also notes that his family, namely his parents and six siblings, continued to live in Chechnya after the applicant had left and had not reported, according to the applicant's own statement, any harassment or abusive behaviour by local or federal security forces in the region. The applicant had kept in regular telephone contact with his father; it is therefore likely that he would have known of any punitive actions against his relatives in Chechnya. In view of the repeatedly reported practice of abuse of relatives of alleged rebels or supporters and sympathisers, it therefore seems that the applicant is not considered to belong to either of these groups.

67. Overall, it seems that in spite of certain improvements, the general security situation in Chechnya cannot be considered safe. However, the applicant's individual situation does not show substantial grounds for believing that he would be at a real risk of ill-treatment within the meaning of Article 3 of the Convention if he returned to the Russian Federation.

68. Furthermore, the Court also notes that the Austrian authorities, in the proceedings concerning the lifting of the applicant's asylum status, took care to obtain updated country information and thoroughly examined the applicant's personal circumstances and arguments when evaluating if he was at real risk of suffering treatment contrary to Article 3 of the Convention if he returned to the Russian Federation. The Court therefore does not concur with the applicant's argument that the Austrian authorities failed to conduct a sufficiently thorough scrutiny of his case.

69. Concerning the assessment made by the domestic authorities of the applicant's individual risk if he returned, the Court notes that the applicant did not counter those conclusions in any depth. Also, in the proceedings before this Court he did not provide any substantial information or evidence allowing it to come to a different conclusion from the one reached above.

70. The Court further attaches importance to the fact that the case concerns expulsion to a High Contracting Party to the European Convention on Human Rights, which has undertaken to secure the fundamental rights guaranteed under this provision (see *Tomic v. the United Kingdom* (dec.), no. 17837/03, 14 October 2003; *Hukić v. Sweden* (dec.), no. 17416/05, 27 September 2005; and *Harutioenyan v. the Netherlands* (dec.), no. 43700/07, 1 September 2009; *Barnic v. Austria* (dec.), no. 54845/10, 13 December 2011).

71. Finally, turning to the parties' arguments concerning the definition of the term of a "particularly serious offence" as used in the Austrian 2005 Asylum Act and in relevant case-law of the Administrative Court, the Court considers that for the purpose of a complaint lodged under Article 3 of the Convention, the question of the applicability of the relevant provision of the Austrian 2005 Asylum Act for the lifting of an asylum status is redundant: the Court reiterates that Article 3 of the Convention prohibits torture or inhuman or degrading treatment in absolute terms, irrespective of the victim's conduct, however undesirable or dangerous that might be (see *Chahal*, cited above, §§ 79 and 80). Therefore, regardless of the definition of a "particularly serious crime" under Austrian law, the actual expulsion of the applicant could still constitute a violation of Article 3 if substantial grounds had been shown for believing that he would be at real and personal risk of being subjected to treatment contrary to that provision.

72. Since in the present case, however, there are no indications of the existence of such substantial grounds, the Court holds that the applicant's deportation to the Russian Federation would not amount to a violation of Article 3 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

73. The applicant also complained of a violation of his right to respect for his family life, in that expulsion to the Russian Federation would separate him from his wife and two children. He relied on Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 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."

A. Admissibility

74. The Court has already dealt with the Government's objection in respect of the six-month time-limit above (see paragraph 54). The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

75. The applicant emphasised that the Austrian authorities, when examining the decision to lift his asylum status and to expel him, in respect of a possible interference with his right to respect for family life overlooked the fact that his wife and the two children, born in 2004 and 2007, had independent asylum status in Austria. In those asylum decisions, the Independent Asylum Panel explicitly stated that the applicant's wife had a well-founded fear of independent persecution if she returned to the Russian Federation. It followed that the applicant's wife and children could not reasonably be expected to follow the applicant to the Russian Federation to maintain family life; in fact, an expulsion of the applicant to the Russian Federation would render any effective family relations impossible.

76. The applicant further stated that due to his asylum status in Austria, his links with Chechnya had weakened considerably. Finally, compared to the offences committed in the cases of *Amrollahi* and *Üner* (see *Amrollahi v. Denmark*, no. 56811/00, § 15, 11 July 2002, and *Üner v. the Netherlands* [GC], no. 46410/99, § 18, ECHR 2006-XII), the applicant's convictions for aggravated bodily harm, for which he received a twelve-month prison sentence, and for resistance to public authority, for which he received an eight-month sentence, must be considered less severe.

77. The Government submitted that the Austrian authorities had carefully examined all legal conditions regarding the proceedings to lift the applicant's asylum status, and had weighed the competing interests involved in line with the *Boultif* criteria (see *Boultif v. Switzerland*, no. 54273/00, § 48, ECHR 2001-IX). After a thorough evaluation of the proportionality of the interference with the applicant's right to respect for his family life, the authorities came to the decision that the expulsion was proportionate to the aim pursued, especially in view of the applicant's entry into the country as an adult, the lack of effort on his part to integrate into Austrian society, and the offences committed.

2. The Court's assessment

78. The Court reiterates that a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its

territory and their residence there (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94; *Boujlifa v. France*, 21 October 1997, § 42, *Reports* 1997-VI; *Üner,* cited above, § 54; and *Darren Omoregie and Others v. Norway*, no. 265/07, § 54, 31 July 2008). There is no right as such for an alien to enter or reside in a particular country under the Convention. However, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed in Article 8 § 1 of the Convention (see *Moustaquim v. Belgium*, 18 February 1991, § 43, Series A no. 193, and *Amrollahi*, cited above, § 26, 11 July 2002).

(a) Whether there was an interference with the applicants' right under Article 8 of the Convention

79. In the present case, the applicant was living legally as a recognised refugee in Austria with his wife and two children, born in 2004 and 2007 respectively, and who had also been granted asylum, until his asylum status was lifted and his expulsion to the Russian Federation ordered. Accordingly the applicant enjoyed family life with his wife and children and the expulsion order interfered with his right to respect for his family life within the meaning of Article 8 § 1 of the Convention. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 8. It is therefore necessary to determine whether it was "in accordance with the law", motivated by one or more of the legitimate aims set out in that paragraph and "necessary in a democratic society".

(b) Whether the interference was "in accordance with the law"

80. The Austrian authorities relied in particular on Articles 7 and 10 of the 2005 Asylum Act. The applicability of these provisions is undisputed by the parties.

81. The Court is satisfied that for the purpose of Article 8 § 2 the interference was "in accordance with the law".

(c) Whether the interference pursued a legitimate aim

82. When lifting the applicant's asylum status and expelling him to the Russian Federation, the Austrian authorities did so on the basis of the applicant's criminal record and in the interests of public order and security. The Court is therefore also satisfied that the measure was ordered "for the prevention of disorder or crime" within the meaning of the Convention.

(d) Whether the interference was "necessary in a democratic society"

83. It remains to be ascertained whether the decision to expel the applicant in the specific circumstances of the case struck a fair balance between the relevant interests, namely the applicant's right to respect for his family life on the one hand, and the prevention of disorder or crime on the other. The guiding principles in order to examine whether the measure was necessary in a democratic society have been established by the Court as follows (see *Boultif,* cited above, § 48, and *Üner*, cited above, § 58): in assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the applicant, the length of the applicant's stay in the country from which he is going to be expelled, the time elapsed since the offence was committed and the applicant's conduct during that period, the nationalities of the various persons concerned, the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life, whether the spouse knew about the offence at the time when he or she entered into a family relationship, whether there are children in the marriage and if so their age, and also the seriousness of the difficulties which the spouse is likely to encounter in the country of origin. Furthermore, the Court will examine the best interests and well-being

of the children, in particular the seriousness of the difficulties which the children of the applicant are likely to encounter in the country to which the applicant is to be expelled, and the solidity of social, cultural and family ties with the host country and with the country of destination.

84. Turning to the first set of criteria relating to the criminal offences committed by the applicant, the Court reiterates that the applicant was in 2006 convicted of attempted resistance to public authority, aggravated bodily harm and aggravated damage of property, and sentenced to eight months' imprisonment. Some two years later, in March 2008, he was again convicted of partly attempted and partly actual aggravated bodily harm and sentenced to twelve months' imprisonment. The partial suspension and probation order in respect of his former conviction was itself suspended, and the applicant served both sentences. Earlier, in 2005, the applicant had also been convicted of attempted theft and sentenced to two weeks' imprisonment, suspended with probation. The Court thus acknowledges that the measure taken by the Austrian authorities was based on serious offences committed by the applicant. However, the Court also notes that the applicant was released from prison in August 2009 and went back to live with his family. In the approximately two and a half years since the applicant's release, no further criminal investigations have been initiated against him and there have been no further convictions.

85. As regards the length of the applicant's stay in the host country and his social and cultural links with Austria the Court notes that the applicant, who has now lived in Austria for almost nine years, has not established any particularly strong links to that country. He does not seem to have mastered the German language. He has also never worked in Austria and did not develop any significant social or cultural ties there.

86. On the other hand, the applicant lived in Chechnya for almost twenty-three years, went to school there and subsequently worked occasionally in different jobs. The applicant's parents and siblings still live in Chechnya, and the applicant has maintained regular contact with his father.

87. The Court therefore considers, in line with the Austrian authorities, that the applicant still has stronger social and cultural ties to his country of origin than to his host country.

88. As regards the applicant's family ties the Court notes that the applicant and his wife are Russian nationals, who arrived in Austria together in July 2003. The couple have two children, who were both born in Austria but who are also Russian nationals. The family lived together, apart from when the applicant was in prison, during which time however, the applicant's wife visited him regularly. After his release from prison the applicant went back to live with his family.

89. The Court further notes that the applicant's wife and the children are recognised refugees in Austria, with asylum status which has been awarded to them in separate decisions. However, the Court acknowledges that at the time the applicant's wife was considered to be at risk of persecution in Chechnya due to her husband being at risk. The applicant's wife herself never claimed a risk of ill-treatment because of her own conduct or her own role in any of the armed conflicts. Consequently, in view of the Court's finding with regard to the applicant's complaint under Article 3 of the Convention above, the applicant's wife can also not be considered as being at a real risk of being subjected to treatment contrary to Article 3 of the Convention if she returned to Chechnya.

90. The applicant's wife was born in Grozny and spent all her life in Chechnya until she left for Austria with her husband. The couple's children are still of an adaptable age (see *Darren Omoregie and Others,* cited above, § 66). The applicant's wife, who has resident status in Austria for herself and the children based on their asylum status, might have a considerable interest in not returning to Chechnya. But although the Court does not underestimate the difficulties of a relocation of the family, there is no indication that there are any insurmountable obstacles in the way of the applicant's wife and the children following

the applicant to Chechnya and developing a family life there (see *Gül v. Switzerland*, 19 February 1996, § 42, *Reports* 1996-I, and *Darren Omoregie and Others*, cited above, ibid.).

91. Thus in view of the seriousness of the criminal offences committed by the applicant, his strong and living ties to his country of origin, his parents and siblings' living there and the possibility for the applicant's wife and children to follow him to Chechnya and to develop a joint family life there, the Court finds that the Austrian authorities have not failed to strike a fair balance between the applicant's interests in respect of his family life and the public interest in the prevention of disorder or crime.

92. The applicant's expulsion to the Russian Federation would therefore not amount to a violation of Article 8 of the Convention.

IV. RULE 39 OF THE RULES OF COURT

93. The Court reiterates that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

94. It considers that the indication made to the Government under Rule 39 of the Rules of Court (see above paragraph 4) must continue in force until the present judgment becomes final or until further order (see operative part).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that the applicant's expulsion to the Russian Federation would not violate Article 3 of the Convention;

3. *Holds* that the applicant's expulsion to the Russian Federation would not violate Article 8 of the Convention;

4. *Decides* to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to expel the applicant until such time as the present judgment becomes final or until further order.

Done in English, and notified in writing on 12 June 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Nina Vajić
Registrar President