CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

CASE OF MELNIK v. UKRAINE

(Application no. 72286/01)

JUDGMENT

STRASBOURG

28 March 2006

FINAL

28/06/2006

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Melnik v. Ukraine,

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

Mr J.-P. COSTA, *President*,
Mr I. CABRAL BARRETO,
Mr V. BUTKEVYCH,
Mrs A. MULARONI,
Mrs E. FURA-SANDSTRÖM,
Ms D. JOČIENĖ,
Mr D. POPOVIĆ, *judges*,

and Mr S. NAISMITH, *Deputy Section Registrar*,

Having deliberated in private on 7 March 2006,

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

PROCEDURE

1. The case originated in an application (no. 72286/01) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Aleksandr Vasilyevich Melnik ("the applicant"), on 14 November 2000.

2. The applicant, who had been granted legal aid, was represented by Mr Shulgin, a lawyer practising in Vinnytsia. (Mr V.M. Shulgin is a public defender appointed by the All-Ukrainian Committee for the Defence of Human Rights in the Vinnytsia Region - hereafter referred to as the "Committee". Mr Shulgin is also a member of the Union of Lawyers of Ukraine - *Спілка Юристів України*). The Ukrainian Government ("the Government") were represented by their Agent, Ms Zoryana Bortnovska, succeeded by Ms Valeria Lutkovska.

3. On 28 January 2003 the Court decided to communicate the application to the Government. On 6 April 2004 the Court communicated additional complaints under Article 3 of the Convention. It also gave priority to the application and, under the provisions of Article 29 § 3 of the Convention, decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

4. The applicant, Mr Aleksandr Vasilyevich Melnik, is a Ukrainian national who was born on 17 May 1961. He is currently serving a prison sentence.

I. THE CIRCUMSTANCES OF THE CASE

A. Criminal proceedings against the applicant

5. In December 1999 M.O.D. (a private person) found a packet of opium (*макова соломка*). M.O.D., with the applicant's agreement, later hid the packet in the applicant's house with a view to its subsequent sale and the purchase of alcohol.

6. On 28 February 2000 the captain of the Vinnytsia District of the Interior's Division on Combating the Illegal Circulation of Drugs (the "CICD") issued a resolution authorising the purchase of opium from the applicant on the basis of information received from undisclosed sources. This resolution was approved by the Vinnytsia District prosecutor and the Head of the Vinnytsia Department of the Interior.

7. On the same date C.I.S. (an undercover police agent operating under a pseudonym) received instructions from police officers (*міліціонерів*) to purchase some of the opium. He also received the sum of 12 hryvnas (UAH)[1] for that purpose.

8. On the same date the applicant and M.O.D. were apprehended for selling drugs to C.I.S. The opium, which weighed 190 grams, was seized by the police, together with the marked money received by the applicant from C.I.S. The police prepared records of the purchase (*про оперативну закупку*), finding, confiscation (*віднайдення та виїмки*) and weighing (*взвішування*) of the substance and of the search of the buyer (*акт огляду покупця*). Statements were drawn up in the presence of two witnesses, as required by the relevant provisions of the Code of Criminal Procedure. The applicant and M.O.D. were not placed in detention, but were released on an undertaking not to abscond.

9. On 9 and 10 March 2000 the investigator of the Investigative Division of the Ministry of the Interior's Vinnytsia District Department (the "Division") questioned two witnesses (V.V.M. and P.Yu.M.). They were the police officers from the CICD who had organised the purchase and subsequently arrested the applicant and M.O.D.

10. On 24 March 2000 the Division's investigator informed the applicant that he was entitled to have a representative. The investigator relied on Articles 21, 44 and 45 of the Code of Criminal Procedure. The applicant stated that he refused to be represented by a lawyer and that this decision was not related to his financial situation.

11. On the same date the Division's investigator issued a resolution accusing the applicant of being involved in the purchase, sale and storage of narcotic substances with intent to sell, premeditated by a group of persons

1. 2.3 euros (EUR)

(Article 229-1 of the former Criminal Code). The applicant was questioned by the investigator as an accused.

12. The applicant claims that in the course of the investigation he and his relatives requested legal representation.

13. On 25 April 2000 the Vinnytsia District Court of the Vinnytsia region (*Вінницький районний суд Вінницької області*) held a preliminary hearing. It assumed jurisdiction over the case and adjourned the hearing to 22 May 2000 at the applicant's request. The applicant informed the court that he did not wish to be represented by a lawyer but wished to represent himself at the hearing. The hearing was adjourned upon M.O.D.'s request.

14. On 22 May 2000 the court resumed its examination of the case. The participants in the hearing were the prosecutor, the applicant and M.O.D., a witness police officer from the CICD (S.V.V.) and G.A.I., the applicant's neighbour, who had witnessed the arrest and seizure of money by the police officers.

15. During the hearing the court accepted the applicant's decision not to be represented by a lawyer. It also decided to hear the case in the absence of certain prosecution witnesses (P.Yu.M. and V.V.M.), who had been duly informed about the date and time of the hearing but did not appear before the court. The judge also informed the applicant and his co-accused that a guilty plea might be accepted by the court as a mitigating factor.

16. On 23 May 2000, at the hearing, the applicant pleaded partly guilty to the charges against him. In particular, he stated that he considered himself guilty of storing the opium. In the course of the trial the applicant again rejected legal assistance and stated that he wished to present his own arguments for reasons unrelated to his difficult financial situation.

17. During the hearing the applicant and his co-accused did not attempt to challenge any evidence and made no pleas, except those relating to the acknowledgment of their guilt and the mitigation of their sentence. On the same date the Vinnytsia District Court convicted the applicant of involvement in the unlawful purchase and possession of drugs, with intent to sell, premeditated by a group of persons (Article 229-1 of the former Criminal Code). It sentenced him to five years' imprisonment and ordered that his personal property be confiscated. In particular, the Vinnytsia District Court found that,

> "... in the course of the hearing [the applicant] partly acknowledged his guilt ...
>
> ... in the course of the preliminary investigation witnesses [P.Yu.M.] and [V.V.M.] (police officers) explained that [C.I.S.] was to purchase [opium] at Melnik's place of residence ...
>
> The defendant's guilt ... is also proved by other evidence, in particular the act of purchase, the record of searching the buyer, the record of the undercover purchase, the record of seizure, the record of the weighing, [and] the forensic expert's conclusion [as to the amount of dry opium poppy]...

> ... the court considers that the following *corpus juris*, envisaged by Article 229-1 of the Criminal Code..., can be found in the actions of Melnik O.V.: - the unlawful purchase [and] possession with intent to sell, premeditated by a group of persons..."

18. On 29 May 2000 the applicant appealed against his conviction to the Vinnytsia Regional Court. In particular, he stated that he had only been storing the opium, and that his sentence should be milder, not involving a deprivation of liberty.

19. On 12 July 2000 the Vinnytsia Regional Court, in the absence of the applicant and in the presence of a prosecutor, rejected the applicant's appeal and upheld the judgment of 23 May 2000. The judgment became final.

20. On 24 October 2000 the Committee reviewed a petition from the applicant's wife, asking that he be assigned legal representation. On the same date the Committee appointed Mr Shulgin as the public defender (*громадський захисник*) to represent the applicant.

21. On 30 October 2000 Mr Shulgin lodged complaints with the President of the Vinnytsia District Court, seeking permission to review the case file and authorisation to meet the applicant in order to prepare an appeal against the judgment.

22. On 2 November 2000 the judge of the Vinnytsia District Court refused this application on the ground that the law did not allow for such an action by a public defender. In particular, the court informed Mr Shulgin:

> "... Vinnytsia District Court informs you that your application of 30 October 2000 with regard to providing the materials of the criminal case ... and an opportunity to meet the defendant in order to represent him in supervisory proceedings cannot be allowed because, in accordance with the legislation of Ukraine, a public defender (*громадський захисник*) can only participate in the judicial consideration of the case and the law does not afford him a right of appeal against the verdict.
>
> Also, Article 384 of the Code of Criminal Procedure... provides an exhaustive list of those persons who have the right to lodge *protests* against court verdicts, rulings or resolutions that have entered into force, and Chapter 31 of the Code of Criminal Procedure ... sets out the grounds and the procedure for [such a] supervisory review..."

B. The applicant's detention

23. On 28 September 2000 the applicant was detained for the purpose of serving his sentence and placed in the Vinnytsia Temporary Detention Centre.

24. On 29 September 2000 the applicant was transferred to Vinnytsia Prison No. 1, where he stayed from 29 September to 18 October 2000.

25. On arrival at Vinnytsia Prison No. 1 the applicant was examined by doctors from the prison's medical unit and found to be generally healthy.

26. On 2 October 2000 the applicant underwent a chest X-Ray examination. This examination found no signs of illness.

27. Between 29 September and 18 October 2000, the applicant lodged no complaints or applications with the prison administration for dispatch to third persons.

28. At some time between 18 October and 31 October 2000, the applicant was transferred from Vinnytsia Prison No. 1 to Arbuzynsk Penitentiary No. 316/83 in the Mykolayiv Region ("Penitentiary No. 316/83").

29. On 31 October 2000 the applicant arrived at Penitentiary No. 316/83. However, he did not undergo the mandatory medical examination for possible tuberculosis.

30. The applicant was detained in Penitentiary No. 316/83 from 31 October 2000 to 23 April 2001. He was accommodated in dormitory no. 10. He had a separate bed and essential furniture, and was provided with clothes and linen. There were 32 other inmates in the dormitory, which had natural ventilation, large glass windows and electricity.

31. During the applicant's stay there, he had two visits from relatives: one from his brother on 7 December 2000 and one from his wife on 8 December 2000.

32. Between October 2000 and April 2001, the administration of the Penitentiary recorded no correspondence from the applicant. Furthermore, there was no record of a request from the applicant's representative to meet the applicant among the entries in the prison's register of citizens' complaints for 2000-2001.

33. On 13 April 2001, for the first time, the applicant applied to a doctor in Penitentiary No. 316/83, complaining that he was experiencing shortness of breath and was coughing up phlegm. On the same date he was examined and an X-ray was taken. Following this examination, a doctor from the Arbuzynsk Central District Hospital diagnosed the applicant as suffering from pneumonia and suspected lung cancer. Another chest X-ray was ordered to establish a final diagnosis.

34. On 14 April 2001 a further chest X-ray was taken. A radiologist at the Arbuzynsk Central District Hospital concluded that the applicant was suffering from lung cancer.

35. On 19 April 2001 the applicant was transferred to the Hospital of Daryivska Penitentiary No. 10 for further medical examinations and treatment. Between 19 April and 22 June 2001, the applicant received treatment and underwent further clinical examinations. The final diagnosis was tuberculosis in its early stages.

36. On 23 April 2001 the applicant was transferred to Snigurivska Penitentiary No. 5 in the Mykolayiv Region ("Penitentiary No. 5"; an interregional tuberculosis hospital for convicts), where the diagnosis of tuberculosis was confirmed.

37. From 26 June 2001 the applicant underwent in-patient treatment at Penitentiary No. 5. The Government claimed that he received all the

medication prescribed by the recommendations of the Ministry of Public Health.

38. On 4 June 2002, owing to an improvement in his state of health, the applicant was transferred to outpatient treatment. From 11 August 2003 onwards, the applicant received regular outpatient treatment in order to prevent a relapse. However, the lengthy treatment for tuberculosis led to side-effects, such as sight impairment (*погіршення зору*) and dizziness.

39. Since 12 March 2004 the applicant has been detained at Penitentiary No. 5, with a diagnosis of clinically cured tuberculosis.

40. According to the register of correspondence of Penitentiary No. 5, the applicant sent a letter to his wife on 12 November 2002. No other correspondence was sent by him.

41. On 20 December 2001 the applicant received a 24-hour visit from his brother.

42. The Government alleged that, in the course of serving his sentence, the applicant received no visits from lawyers or public defenders, and did not submit any applications concerning such visits.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant domestic law and practice in relation to complaints under Article 6 § 1 of the Convention

1. Constitution of Ukraine

43. The relevant extracts from Articles 59 and 63 of the Constitution of Ukraine read as follows:

> "Everyone has the right to legal assistance. Such assistance is provided free of charge in those cases envisaged by law. Everyone is free to choose the defender of his or her rights..."

> "... A suspect, an accused or a defendant has the right to a defence..."

2. Code of Criminal Procedure (prior to amendment on 21 June 2001)

44. The relevant provisions of the Code of Criminal Procedure read as follows:

Article 21

Ensuring the right of defence for suspects, accused persons and defendants

> "The defence rights of suspects, accused persons or defendants shall be ensured.

Persons conducting an inquiry, investigators, prosecutors, judges and the courts are obliged to explain to the suspect, accused or defendant that, in order to have the benefit of a defence lawyer before the first examination, they [the competent officials] must draw up a written statement. They should also provide the suspect, accused or defendant with an opportunity to defend himself in accordance with the means established by law, and ensure the protection of his or her personal and property rights."

Article 45*

Obligatory participation of a defence lawyer

"The participation of a defence lawyer during the inquiry and the preliminary investigation and during consideration of the criminal case in the first-instance court is obligatory, save where the suspect, accused person or defendant refuses legal representation in accordance with the procedure established by Article 46 of the Criminal Code of Ukraine."

Article 46

Refusal to have a defence lawyer

"Suspects, accused persons and defendants have the right to refuse legal representation. A refusal of this nature is only possible at the initiative of the suspect, accused or defendant, and cannot be an obstacle to the continued participation of the prosecutor or public accuser in the criminal case, or of defence counsel acting for other suspects, accused persons or defendants.

In the event of a refusal to be represented ... the person conducting the inquiry or the investigator shall draw up a written statement, [and] the court shall issue a ruling or the judge shall deliver a resolution. ..."

Article 47

The procedure for assigning defence counsel

"Defence counsel ... shall be requested to participate in the proceedings by the suspect, accused or defendant, by their lawful representatives, relatives or other persons, in accordance with the authority granted by the suspect, accused person or defendant, or on the basis of an application by them. ..."

*. This Article was amended by the Law Amending the Code of Criminal Procedure of 21 June 2001 and was applicable at the material time.

Article 370

Substantial violations of the requirements of the Criminal Procedure Act

"...The verdict must be annulled in the following circumstances:

...(4) if the case was examined by the court without the participation of defence counsel, where his or her participation is obligatory under the law."

B. Relevant international law reports and other materials concerning conditions of detention and tuberculosis

1. Resolutions of the Cabinet of Ministers of Ukraine

45. Resolution No. 1752 of the Cabinet of Ministers of 27 December 2001 "On the ration of individuals suffering from tuberculosis and infected with micro-bacteria of tuberculosis" provides that each adult convict suffering from tuberculosis must receive 3,198 kcal per day in food rations.

46. Resolution No. 336 of the Cabinet of Ministers of 16 June 1992 "On the approval of the norms of daily food rations of convicts and persons who are held in pre-trial detention facilities [SIZO], sobering-up facilities [LTP] and police detention facilities [ITT]" and its Appendix No. 1 (Norm No. 1 "On providing food for convicts held in penitentiaries") provide that each convict must receive 3,026 kcal (general norm) and 3,059.4 kcal (norm for special diets).

2. Committee for the Prevention of Torture (the "CPT")

47. The relevant extracts from the 2nd General Report on the CPT's activities, covering the period 1 January to 31 December 1991 (CPT/Inf (92) 3 of 13 April 1992), read as follows:

"43. The issue of what is a reasonable size for a police cell (or any other type of detainee/prisoner accommodation) is a difficult question. Many factors have to be taken into account when making such an assessment. However, CPT delegations felt the need for a rough guideline in this area. The following criterion (seen as a desirable level rather than a minimum standard) is currently being used when assessing police cells intended for single occupancy for stays in excess of a few hours: in the order of 7 square metres, 2 metres or more between walls, 2.5 metres between floor and ceiling."

48. The relevant extracts from the 7th General Report of the Committee for the Prevention of Torture (CPT/Inf (97) 10), relating to "prison overcrowding" and "large capacity dormitories", read as follows:

"28. The phenomenon of prison overcrowding continues to blight penitentiary systems across Europe and seriously undermines attempts to improve conditions of detention. The negative effects of prison overcrowding have already been highlighted

in previous General Reports. As the CPT's field of operations has extended throughout the European continent, the Committee has encountered huge incarceration rates and resultant severe prison overcrowding. ...

29. In a number of countries visited by the CPT, particularly in central and eastern Europe, inmate accommodation often consists of large capacity dormitories which contain all or most of the facilities used by prisoners on a daily basis, such as sleeping and living areas as well as sanitary facilities. The CPT has objections to the very principle of such accommodation arrangements in closed prisons and those objections are reinforced when, as is frequently the case, the dormitories in question are found to hold prisoners under extremely cramped and insalubrious conditions. No doubt, various factors – including those of a cultural nature - can make it preferable in certain countries to provide multi-occupancy accommodation for prisoners rather than individual cells. However, there is little to be said in favour of - and a lot to be said against – arrangements under which tens of prisoners live and sleep together in the same dormitory.

Large-capacity dormitories inevitably imply a lack of privacy for prisoners in their everyday lives. Moreover, the risk of intimidation and violence is high. Such accommodation arrangements are prone to foster the development of offender subcultures and to facilitate the maintenance of the cohesion of criminal organisations. They can also render proper staff control extremely difficult, if not impossible; more specifically, in case of prison disturbances, outside interventions involving the use of considerable force are difficult to avoid. With such accommodation, the appropriate allocation of individual prisoners, based on a case by case risk and needs assessment, also becomes an almost impossible exercise. All these problems are exacerbated when the numbers held go beyond a reasonable occupancy level; further, in such a situation the excessive burden on communal facilities such as washbasins or lavatories and the insufficient ventilation for so many persons will often lead to deplorable conditions.

The CPT must nevertheless stress that moves away from large-capacity dormitories towards smaller living units have to be accompanied by measures to ensure that prisoners spend a reasonable part of the day engaged in purposeful activities of a varied nature outside their living unit."

49. The relevant extracts from the 7th General Report on the CPT's activities covering the period 1 January to 31 December 1996, CPT/Inf (97), published on 22 August 1997 (with further references to CPT's 2nd Report on its activities covering the period 1 January to 31 December 1991 [CPT/Inf (92) 3, paragraph 46]) read as follows:

"An overcrowded prison entails cramped and unhygienic accommodation; a lack of privacy (even when performing such basic tasks as using a sanitary facility); reduced out-of-cell activities, due to demand outstripping the staff and facilities available; overburdened health-care services; increased tension and hence more violence between prisoners and prisoners and staff. This list is far from exhaustive. The CPT has been led to conclude on more than one occasion that the adverse effects of overcrowding have resulted in inhuman and degrading conditions of detention."

3. The CPT's 2002 Report on its visit to Ukraine

50. In so far as it concerns tuberculosis, the Committee for the Prevention of Torture's report on its visit to Ukraine in 2002 (CPT/Inf (2002)23), reads as follows:

> "... In its two previous reports, the CPT dealt at length with this major problem affecting the Ukrainian penitentiary system. In 2000, the state of affairs in the establishments visited was just as desperate as in the past when it came to combating *tuberculosis* and caring for prisoners suffering from this disease.
>
> The CPT calls on the Ukrainian authorities to ensure that the penitentiary system is in a position to pursue a strategy for effective screening and action against tuberculosis, in keeping with the recommendations it has already made (cf. paragraphs 153 and 154 of the report on the 1998 visit and paragraph 51 of the report on the 1999 visit, as well as paragraph 104 above).
>
> ... The conditions observed were favourable to the spread of the disease and as such constituted a clear health hazard for patients: in particular, there was no access to natural light or fresh air and hygiene was inadequate. ... Furthermore, in the light of other findings made by its delegation, the Committee recommends that all *tuberculosis* patients be offered at least one hour in the open air per day.
>
> ... Recommendations (on health care services):
>
> - the necessary measures to be taken to ensure that penitentiary establishments have a sufficient supply of appropriate medicines, a particularly high priority to be given to the supply of medicines for the treatment of tuberculosis (paragraphs 104, 106 and 111);
>
> - ensure in all penitentiary establishments that every newly-arrived prisoner is properly interviewed and physically examined by a medical doctor as soon as possible after his/her arrival; save for in exceptional circumstances, that interview/examination to be carried out on the day of admission, especially in so far as remand establishments are concerned (paragraph 108);
>
> - the Ukrainian authorities to ensure that the penitentiary system is in a position to pursue a strategy for effective screening and action against tuberculosis, in keeping with the recommendations already made by the Committee (paragraph 111);
>
> - all tuberculosis patients to be offered at least one hour in the open air per day (paragraph 112)."

4. World Health Organisation Report 2004

51. The relevant extracts from the World Health Organisation's report on Ukraine read as follows:

> "... Tuberculosis is another important problem facing Ukraine. Although coverage with BCG has been increasing since 1993 to around 97% by the end of the 1990s, reported case notification rates have more than doubled since independence, from 32.2 per 100,000 in 1991 to 66.5/100,000 in 2000, with an estimated case notification rate of 91.3 per 100,000 in 2002. The situation is especially critical in the prison

population, which accounts for about 30% of all tuberculosis patients in Ukraine. It has been estimated that of a prison population of now 200,000 about 14,000 have active TB, which equates a prevalence rate of 7,000 per 100,000. Moreover, 40% of deaths in prisoners are reported to be due to TB. At the same time, drug-resistant tuberculosis is also increasing rapidly, which poses a substantial additional burden to the health care system as it is vastly more difficult and costly to treat. A study from Chernihiv suggests that about 50% of new tuberculosis patients have resistance to at least one drug; multi-drug resistant tuberculosis appears to be present in 10–15% of new cases...

The worsening of the tuberculosis epidemic in Ukraine noted earlier has been attributed to a number of factors. Lack of sufficient funds has resulted in failure to modernize and equip tuberculosis facilities and, more generally, to maintain overall treatment services, leading to a decline in access to services. Also, the continuing increase of tuberculosis rates was facilitated by the emergence of the HIV epidemic, with a reported 50% of adults dying from AIDS in 1997 having tuberculosis. At present, the share of tuberculosis cases that are HIV-positive is estimated at 54 per 100,000 population. The increase in multi-drug resistant tuberculosis resulted from inadequate treatment and shortages in the drug supply. In response to the tuberculosis epidemic, the Ministry of Health adopted a National Programme for Tuberculosis Fighting for 2002–2005. This initiative gained major support by the World Bank with a loan of US $ 60 million for the Tuberculosis and HIV/AIDS Control Project."

5. World Bank Report on Tuberculosis in Ukraine

52. The relevant extracts from the World Bank's Sector-related Country Assistance Strategy (CAS) read as follows (document no. 20723-UA, August 16, 2000):

"... Ukraine has had a long history of effectively controlling tuberculosis and other infectious diseases. The specialized physicians and other medical workers are well-trained, and the system of tuberculosis control has a long and proud history. The system, however, has proven financially difficult to maintain in periods of economic uncertainty. Throughout the country, both in the Ministry of Health (MOH) and in prisons, TB facilities need to be modernized, especially laboratory services, so that TB cases can be detected faster and more effectively. Outpatient services also need to be improved so that treatment regimens can be better monitored and complied with. A detailed analysis of TB sector issues is presented in section B.

... Epidemiological Situation of Tuberculosis: As an outcome of its comprehensive and effective tuberculosis (TB) control system, in 1990, Ukraine reported its lowest number of TB cases in the modern era, 16,465 for a case rate of 32.0 per 100,000 population. As in many of the newly independent states, tuberculosis has increased dramatically in Ukraine following independence from the former Soviet Union. By 1999, the number of cases had reached 32,691, with a case rate of 65.0, a doubling of the rate compared to 1990. Case rates in the administrative regions ranged from 35.9 in Kiev to 72.9 in the Zaporozhye region. About 30 percent of all TB patients in Ukraine are in prison and pre-[trial] detention centres (SIZOs). The problems of over-crowding, malnutrition, late diagnosis and lack of drugs are particularly well-known in prisons and aggravate the TB situation. About 14,000 of the 200,000 prisoners in Ukraine have active TB (prevalence of an astronomical 7,000 per 100,000). Forty percent of deaths in prisoners are due to TB.

Drug-resistant TB, which is significantly more difficult and costly to treat, is also increasing rapidly. Preliminary results indicate that half of all patients have resistance to at least one drug, while resistance to *isoniazid* and *rifampicin* (referred to as multi-drug resistant TB, or MDR-TB, see annex I1, technical terms) is present in 10-15 percent of new cases.

... Overall, 75-80 percent of cases occur in the 20 to 59 age groups. The ratio of reported cases of TB in men to women is 7 to 1. The disease had risen 141 percent in urban populations between 1990 and 1998, while the increase in rural populations was 67.2 percent. Cases of TB in Ukraine tend to be diagnosed at a much later, more advanced stage of the disease than in other areas of the world.

A combination of factors has contributed to the worsening epidemic. Treatment services were not sustainable during the period of economic decline. Access to care was reduced and treatment default rates increased with the decentralization of services to region and rayon dispensaries... an early merging of the TB and the HIV epidemics was witnessed. In 1997, about 30 percent of adults diagnosed with AIDS and 50 percent of adults dying from AIDS had tuberculosis. The increase in multi-drug resistant TB resulted from inadequate treatment and drug supply shortages."

6. US State Department report (2004)

53. The relevant extracts from the State Department report read as follows:

"... Ukraine's estimated tuberculosis case rate of 95 cases per year per 100,000 people is the eighth highest in Europe and Eurasia. According to the World Health Organization's Global Tuberculosis Control: WHO Report 2004, Ukraine had nearly 47,000 TB cases in 2002. Of these, about half were cases of sputum smear-positive (SS+) TB, a rate of 43 cases per 100,000 people. In 2003, the National Tuberculosis Control Program (NTP) reported 40,271 SS+ cases for an incidence rate of 76 cases per 100,000 people, a near doubling of the rate. In Ukraine, significant barriers to implementation of the WHO-recommended Directly Observed Therapy, Short-Course (DOTS) approach to TB existed, a result of entrenched and outdated medical approaches to TB treatment and management. The TB indicators also reflect the deterioration of Ukraine's health care system since the break-up of the Soviet Union in the early 1990s. This break-up facilitated the spread of infectious diseases, including TB and multidrug-resistant TB (MDR-TB), in many former Soviet republics. Ukraine was unable to sustain the previous TB infrastructure and needed new approaches to combat the growing TB problem."

THE LAW

I. PRELIMINARY CONSIDERATIONS

A. The standing of the applicant's representative

54. The Government submitted that Mr Shulgin had lodged no document with the Court proving that he was the applicant's representative in the proceedings before it. Furthermore, they contended that Mr Shulgin was not "an advocate authorised by law to practice in any of the Contracting Parties" as he was merely a public defender appointed by the All-Ukrainian Committee for the Defence of Human Rights in the Vinnytsia Region. Accordingly, they proposed that the application be struck out of the list of cases on the ground that it had not been introduced by an alleged victim of a violation of the Convention or by a duly authorised representative. The Government also stated that, as the letter of authority was dated 26 May 2003, the application should be rejected on account of the applicant's failure to comply with the six-month time-limit allowed for lodging applications with the Court.

55. The applicant disagreed. In particular, he submitted that he had known about the application to the Court from the very moment it was lodged (2 August 2001) and had consented to his representation before the Court by Mr Shulgin. However, he had been unable to provide a letter of authority sooner, since the head of Penitentiary No. 316/83 had refused to certify his signature. Furthermore, he submitted to the Court a completed power of attorney dated 26 May 2003, certified by the head of Penitentiary No. 5.

56. The Court reiterates that, under Rule 36 of the Rules of Court, where applicants choose to be represented by a lawyer rather than to introduce an application themselves, it is a requirement, under Rule 45 § 3 of the Rules of Court, that a power of attorney or written authority to act shall be supplied by their representative (see *Willis and Others v. the United Kingdom* (dec.), no. 49764/99, 4 March 2003). It notes that certain documents, such as an order issued by the advocate's union, which do not specifically state that the applicant instructs his representative to apply to the European Court of Human Rights, can imply that the representative is entitled to take any legal action aimed at remedying the applicant's situation, including the lodging of an application with the Court (see *Falkovych v. Ukraine* (dec.), no. 64200/00, 29 June 2004). The Court also notes that Mr Shulgin acted on behalf of the applicant from the initial stages of the proceedings, as his public defender, on the basis of a decision of 24 October 2000 by the All-Ukrainian Committee for the Defence of Human Rights in

the Vinnytsia Region. Moreover, he attempted to participate in the proceedings before the criminal courts as the applicant's public defender, as is clear from the case file, and, as a lawyer, he is entitled to represent the applicant in the proceedings before the Court.

57. In these circumstances, the Court considers that the decision of 24 October 2000 and the letter of authority of 26 May 2003 are sufficient to validate the lawyer's powers of attorney and his ability to represent the applicant in the Convention proceedings. The Government's objections as to the lack of standing and failure to comply with the six-month rule are therefore to be dismissed.

B. Abuse of the right of petition

58. The Government claimed that the applicant's lawyer had deliberately mentioned in his submissions to the Court, and in particular in a letter of 12 June 2001, that the applicant was not able to appeal against the judgment of the Vinnytsia District Court of the Vinnytsia region as he had not been provided with defence counsel and he lacked the skills to defend himself. They submitted that the application, which was deliberately grounded on a description of facts in which events of central importance were omitted, could, in principle, constitute an abuse of the right of petition within the meaning of Article 35 § 3 of the Convention. The Government therefore proposed that the application be rejected on that ground.

59. The applicant's representative stated that he had been granted only limited access to the applicant's criminal case file and that the applicant, with no legal knowledge and experience, could not defend himself in the proceedings before the first-instance court. Furthermore, he alleged that his requests to view and examine the case file had been rejected on a number of occasions.

60. The Court, having regard to the submissions of the parties and its case-law on the subject (see *Al-Nashif v. Bulgaria*, no. 50963/99, § 89, 20 June 2002), does not find that the right of individual petition was abused by the applicant's lawyer in the present case, particular regard being had to his limited access to the materials in the case. The Government's objections are therefore unsubstantiated and must be dismissed.

C. The applicant's new complaints lodged after the communication of the case to the respondent Government

61. The Court points out that the institutions set up under the Convention have jurisdiction to review, in the light of the entirety of the Convention's requirements, the circumstances complained of by an applicant. In the performance of their task, the Convention institutions are free to attribute to the facts of the case, as established on the evidence

before them, a characterisation in law different from that given by the applicant or, if need be, to view the facts in a different manner. Furthermore, they have to take into account not only the original application but also the additional documents intended to complete the latter by eliminating initial omissions or obscurities (see *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13, pp. 40-41, § 98, as compared with p. 34, § 79, and pp. 39-40, §§ 96-97).

62. The Court observes that further new complaints were submitted after the communication and in response to the Government's objections as to the admissibility of the application, and were based on an alleged infringement of Article 8 § 1 of the Convention. The Court reiterates that, according to its case-law, the notion of "private life" is a broad one and is not susceptible to exhaustive definition; it may, depending on the circumstances, cover the moral and physical integrity of the person (see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 22; and *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, pp. 60–61, §§ 34 and 36). It reiterates that Article 8 may extend to situations of deprivation of liberty and may be regarded as affording a protection in relation to conditions during detention which do not attain the level of severity proscribed by Article 3 (see *Raninen v. Finland*, judgment of 16 December 1997, *Reports of Judgments and Decisions* 1997-VIII, § 63).

63. However, in the Court's view, these complaints under Article 8 relate not to the applicant's conditions of detention, but instead to the State's alleged interference with the applicant's right to correspond from prison, and are not an elaboration of his original complaint to the Court, lodged five years earlier, on which the parties have already commented. The Court considers, therefore, that it is not appropriate to take these matters up separately at this stage (see *Nuray Şen v. Turkey (no. 2)* judgment of 30 March 2004, no. 25354/94, § 200, and *Skubenko v. Ukraine* (dec.), no. 41152/98, 6 April 2004).

II. ADMISSIBILITY

A. Article 3 of the Convention

64. The applicant complained that he was subjected to inhuman or degrading treatment, in breach of Article 3 of the Convention. In particular, he alleged that he did not receive the necessary medical treatment and assistance for tuberculosis while serving his sentence. He also complained that the conditions of his detention in different penitentiaries were unsatisfactory (the size of the cell in which he was detained, the number of persons in the cell, the bedding and conditions of hygiene, sanitation and

ventilation, nutrition, outdoor daily walks, access to natural light and air, etc.). He further alleged that he was not provided with the required prescription drugs, medicines and the necessary medical care and attention for his tuberculosis. Article 3 provides:

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

1. The parties' submissions

65. The Government considered that the applicant had failed to exhaust all of the domestic remedies available to him under Ukrainian law before lodging his application with the Court. In particular, they referred to the judgment of *Gennadiy Naumenko v. Ukraine* (no. 42023/98, § 136, judgment of 10 February 2004), in which the Court found that recourse to the public prosecutor was, in principle, an effective remedy provided by the domestic law. In this judgment the Court also found that decisions concerning complaints lodged with the prosecutor could be appealed to the domestic courts. Furthermore, the Government maintained that the applicant had a separate option of lodging civil complaints with regard to violations of his rights during his detention by the State Department on Enforcement of Sentences, with a view to receiving compensation for pecuniary or non-pecuniary damage. They referred to Articles 248-1, 248-3 and 248-7 of the Code of Civil Procedure and Articles 440-1, 442 and 455 of the Civil Code. The Government further noted that the availability of such remedies had been confirmed by a judgment of the Chervonogvardiysk District Court of Dnepropetrovsk of 1 November 2001, which had rejected the plaintiff's claims for compensation but analysed his complaints in depth.

66. The applicant disagreed.

2. The Court's assessment

67. The Court reiterates that the only remedies to be exhausted are those which are effective. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time. Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement (see *Dankevich v. Ukraine*, no. 40679/98, § 107, 29 April 2003). The Court further emphasises that Article 35 § 1 of the Convention must be applied with some degree of flexibility and without excessive formalism. Moreover, the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically. In reviewing whether the rule has been observed, it is essential to have regard to the existence of

formal remedies in the legal system of the State concerned**,** the general legal and political context in which they operate**,** as well as the particular circumstances of the case and whether the applicant did everything that could reasonably be expected in order to exhaust available domestic remedies (see *Merit v. Ukraine*, no. 66561/01, § 58, 30 March 2004).

68. The Court points out that the decisive question in assessing the effectiveness of a remedy concerning a complaint of ill-treatment is whether the applicant can raise this complaint before domestic courts in order to obtain direct and timely redress, and not merely an indirect protection of the rights guaranteed in Article 3 of the Convention. The remedy can be both preventive and compensatory in instances where persons complain about their ill-treatment in detention or the conditions thereof.

69. As to the Government's first suggestion, that a complaint be lodged with the public prosecutor who is responsible for supervising the general lawfulness of the enforcement of judgments in criminal cases, the Court finds that this cannot be considered an effective and accessible remedy, given that the prosecutor's status under domestic law does not offer adequate safeguards for an independent and impartial review of the applicant's complaints (see the judgments in *Merit v. Ukraine*, no. 66561/01, § 63, 30 March 2004; *mutatis mutandis*, *Nevmerzhitsky v. Ukraine*, no. 54825/00, § 116, ECHR 2005-... (extracts), and *Salov v. Ukraine*, no. 65518/01, § 58, 6 September 2005). Moreover, the Government have not shown that a complaint to the prosecutor could offer the aforementioned preventive or compensatory redress for allegations of ill-treatment or conditions of detention that are contrary to Article 3 of the Convention.

70. As to the other complaints that the applicant could have lodged, including complaints to the domestic courts, the Court notes that it is not disputed that the applicant complained to the doctor of the detention facility about his illness and that the prison administration was aware that the applicant had contracted tuberculosis. The authorities were thereby made sufficiently aware of the applicant's situation and had an opportunity to examine the conditions of his detention and, if appropriate, to offer redress. While it is true that the applicant did not use the channels suggested by the Government, the Court notes that the problems arising from the conditions of detention and an alleged lack of proper medical treatment were apparently of a structural nature and did not only concern the applicant's personal situation (see *Kalashnikov v. Russia* (dec.), no. 47095/99, 18 September 2001). Moreover, the Government have not demonstrated what redress the domestic courts or other State authorities could have afforded the applicant, given the accepted economic difficulties of the prison administration.

71. In these circumstances, the Court finds that this part of the application cannot be rejected for failure to exhaust domestic remedies. No other ground for declaring it inadmissible has been established.

72. The Court considers, in the light of the parties' submissions, that this part of the application raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits.

B. Article 13 of the Convention

73. The applicant alleged that he did not have at his disposal an effective domestic remedy for his Convention complaints under Article 3, as required by Article 13 of the Convention. In so far as relevant, this provision reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

74. In response, the Government referred to their submissions as to the exhaustion of domestic remedies (see paragraph 65 above).

75. In view of the Court's rejection of the Government's plea on exhaustion of domestic remedies, the applicant's complaints under Article 13 of the Convention must be declared admissible (see paragraphs 67-71 above).

C. Article 6 §§ 1 and 3(c) of the Convention

76. The applicant complained under Article 6 §§ 1 and 3(c) of the Convention (and implicitly Article 6 § 3(d)) that he was refused legal assistance for his trial before the court of first instance. The applicant claimed that, due to the absence of a defence lawyer, he was unable to lodge an appeal against the Vinnytsia District Court judgment. He alleged that his right of access to a court, guaranteed by Article 6 § 1 of the Convention, had been infringed. He also complained under Article 6 § 1 of the Convention that police officers, including an *agent provocateur*, incited the commission of the offence through the organised purchase of drugs (*оперативна закупка*), and that their actions deprived the applicant of a fair trial from the outset. Referring to the same provision, he alleged that his conviction was unfair. He further complained that he did not have adequate time and facilities to prepare his defence, and that certain witnesses were not questioned during the trial. The relevant provisions provide:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...
>
> ... 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ... (b) to have adequate time and facilities for the preparation of his defence;

> ... (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; ...
>
> ... (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ..."

1. Submissions of the parties

77. The Government submitted that this complaint should be rejected for non-exhaustion of domestic remedies. In particular, they maintained that the applicant did not raise the issue of a lack of legal representation in the course of the appeal proceedings, and failed to contest an alleged lack of questioning of particular witnesses or other alleged violations of his defence rights. Instead, the applicant only requested the mitigation of the punishment to be imposed on him.

78. The applicant disagreed. He stated that he could not possibly have defended himself as he had no specialist legal knowledge and had no legal representative. Thus, he could not effectively challenge the admissibility of evidence presented by the police or the lack of legal representation during the investigation and at the trial stage. Furthermore, his appeal was drafted in very general terms, given that he had prepared it himself, and concerned only the request to suspend his sentence and release him from custody. The applicant concluded that he had been unable to comply with the requirement of exhaustion of domestic remedies without a legal representative, since the complaints were very technical and required specialist legal knowledge.

2. The Court's assessment

79. The Court notes that the applicant was not assisted by a lawyer during the criminal proceedings in his case. It appears that the applicant voluntarily refused legal representation which, otherwise, would have been compulsory (Article 45 of the former Code of Criminal Procedure; hereinafter the "CCP"; paragraph 44 above). As to the possibility of lodging an appeal with the Vinnytsia Regional Court against the judgment of the Vinnytsia District Court of 23 May 2000, the issue raised by the parties, the Court notes that domestic law allowed such an appeal and was used by the applicant. In its ruling the Vinnytsia Regional Court rejected the applicant's request for the mitigation of his sentence.

80. The Court observes that Ukrainian law at the material time obliged the person conducting the investigation, or the trial court, to explain to a defendant his or her right to be legally represented (see paragraph 44 above). It also obliged the competent authorities to draw up a written explanatory notice of the legal aid system (Article 21 of the CCP; paragraph 44 above). In the course of the judicial hearing, these

explanations were to be included in the verbatim record. If the defendant refused representation, a signed written statement to that effect had to be made (Article 46 of the CCP; paragraph 44 above). The CCP also envisaged that non-compliance with these conditions might lead to the judgment being quashed by the appeal court, and the case being remitted for fresh consideration by the first-instance court, or for additional inquiries by the investigative body (Article 370 of the CCP; paragraph 44 above).

81. The Court finds that these procedural guarantees were observed in the present case. It cannot therefore be said that the applicant was refused legal aid at any stage, as he unequivocally waived the right. The desire of the applicant's wife to have a public defender take up the case, after the proceedings had been terminated, by way of a *protest*, did not lead to a refusal of legal aid relevant to the determination of the criminal charge under Article 6 of the Convention (paragraphs 20-22 above).

82. In these circumstances, the Court upholds the Government's objection that, in respect of legal representation, the applicant never raised this matter before the domestic authorities. Therefore this part of the application must be rejected for non-exhaustion of domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

83. The Court has also had regard to the applicant's other complaints under Article 6, but finds no trace in the proceedings that he raised them at any stage, in form or in substance, before the trial or appeal courts. In these circumstances, the Court must reject them for the same reason as above – non-exhaustion of domestic remedies – pursuant to Article 35 §§ 1 and 4 of the Convention.

D. Article 34 of the Convention

84. The applicant complained that the State had interfered with the effective exercise of his right of application. In particular, the domestic authorities had unreasonably refused his lawyer permission to meet with him. Furthermore, obstacles were placed in the way of the applicant's complaining to the European Court of Human Rights about the fairness of the proceedings in his case and the conditions of his detention. He relied on Article 34 of the Convention:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

85. The Government contested these allegations. They stated that the applicant was not prevented from complaining to the European Court of Human Rights about the fairness of the proceedings in his case and his conditions of detention.

86. The Court recalls that it is of the utmost importance for the effective operation of the system of individual petition, guaranteed by Article 34 of the Convention, that applicants or potential applicants should be able to communicate freely with the Court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints (see *Akdivar and Others and Others v. Turkey*, judgment of 16 September 1996, *Reports* 1996-IV, p. 1219, § 105, and *Kurt v. Turkey*, judgment of 25 May 1998, *Reports* 1998-III, p. 1192, § 159).

87. In this context, "pressure" includes not only direct coercion and flagrant acts of intimidation, but also other improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention complaint, such as an unjustified threat of criminal or disciplinary proceedings against the legal representative (see the above-mentioned *Kurt* case, pp. 1192-1193, §§ 160 and 164, and *Şarlı v. Turkey*, no. 24490/94, §§ 85-86, judgment of 22 May 2001).

88. In the present case, the applicant's representative contended that his contacts with the applicant were hampered by the prison authorities. However, he has provided insufficient proof of his complaints. He submitted four letters, two from the Vinnytsia District Court dated 25 March and 2 April 2003, one from the Vinnytsia Regional Court of Appeal dated 26 March 2003, and one from Penitentiary No. 316/83, informing him that it was impossible to provide him with access to the case file, since he did not have the letter of authority required by the Code of Criminal Procedure, or that the applicant had been moved to a different penitentiary.

89. The Court considers that these refusals cannot be construed as hindrance within the meaning of Article 34 of the Convention. The applicant's representative was provided with the necessary documents for the proceedings before it by the Registry of the Court. In this context, the Court observes that the applicant was able to lodge his application and observations. He has also continued to correspond with the Court without any obstacles.

90. In the light of the foregoing, the Court does not find it established that the applicant was hindered in the exercise of his right of individual petition. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

E. Conclusions as to admissibility

91. The Court considers, in the light of the findings in paragraphs 71-72 and 75 above, that the applicant's complaints under Articles 3 and 13 of the Convention must be declared admissible. The remainder of the application is to be rejected for the reasons mentioned above (see paragraphs 83 and 90).

III. MERITS

A. Compliance with Article 3 of the Convention

1. The Court's case-law

92. The Court reiterates that Article 3 of the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see, for example, *Labita v. Italy* [GC], no 26772/95, § 119, ECHR 2000-IV). Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 65, § 162).

93. A deprivation of liberty may often involve degrading elements. Yet it cannot be said that detention after conviction in itself raises an issue under Article 3 of the Convention. Nor can that Article be interpreted as laying down a general obligation to release a person on health grounds or to place him in a civil hospital to enable him to obtain specific medical treatment. Nevertheless, under this provision the State must ensure that a person is detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (see *Kudła v. Poland* [GC], no. 30210/96, §§ 92-94, ECHR 2000-XI). When assessing conditions of detention, account has to be taken of the cumulative effects of those conditions, as well as the specific allegations made by the applicant (see *Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001-II).

94. There are three particular elements to be considered in relation to the compatibility of the applicant's health with his stay in detention: (a) the medical condition of the prisoner, (b) the adequacy of the medical assistance and care provided in detention and (c) the advisability of maintaining the detention measure in view of the state of health of the applicant (see *Mouisel v. France*, no. 67263/01, §§ 40-42, ECHR 2002-IX).

2. The Government's submissions

95. The Government submitted that the applicant's allegations concerning the lack of proper nutrition were groundless. They stated that while the applicant was detained in Vinnytsia Prison No. 1, he was fed in

accordance with the statutory norm which at the time, in 2000, had an energy value of 2,846.73 kcal. Subsequently, the nutrition he received corresponded to the norms approved by the Cabinet of Ministers on 27 December 2001 (see paragraph 45 above). The average energy value of his food thus amounted to 3,100-3,150 kcal per day.

96. The Government submitted that, while being held in Penitentiary No. 316/83, the applicant was detained with 15 other convicts in cell no. 26, which measured 44.7 square metres ("m²"). Each prisoner had 2.98 m² of personal space. The cell was properly ventilated with fresh air and the prisoners had access to daylight. The applicant had daily walks outside. He could also have a shower and wash his clothes once a week. The Government further submitted that the applicant was able to exercise in the yard and spend unlimited time outdoors during waking hours. The nutrition provided to the applicant corresponded to Resolution No. 336 of the Cabinet of Ministers of 16 June 1992 (see paragraph 46 above), with an energy value of 2,900-3,000 kcal per day.

97. They maintained that, during his stay in Penitentiary No. 5, the applicant was accommodated in dormitory no. 1 with 12 other inmates. The applicant had a separate bed and essential furniture. The dormitory had free access to daylight through 1.2 x 1.5 metre windows, as well as natural ventilation and electricity. The applicant was able to take daily walks and spend unlimited time outdoors during waking hours.

3. The applicant's submissions

98. The applicant stated that, during his detention in Vinnytsia Prison No. 1 from 29 September to 18 October 2000, he was held in cell no. 26, which was designed for 24 persons. However, he alleges that approximately 60 persons were held in it, some of whom had tuberculosis and AIDS. They slept on metal bunk beds. The detainees took it in turns to sleep. The cell was dirty and infested with pests, cockroaches and bedbugs. The applicant had no access to daylight and fresh air, and had approximately 1-1.5 m² of personal space. He was not provided with appropriate nourishment.

99. He further alleged that between 18 October and 31 October 2000, while being transferred from Vinnytsia Prison No. 1 to Penitentiary No. 316/83, he was placed in a sleeping compartment designed for 12-15 persons. The special trains for transporting detainees and convicted prisoners had no access to daylight or adequate supply of drinking water. No food was provided other than some bread and water. He claimed that, on his arrival at Penitentiary No. 316/83, he was not given a medical examination for possible tuberculosis.

100. The applicant complained that, while detained in Penitentiary No. 316/83 from 31 October 2000 to 23 April 2001, prior to his transfer to the interregional tuberculosis hospital for convicts (Penitentiary No. 5), the daily nutritional ration did not correspond to his actual needs or

the statutory norms. He complained that most food products were provided by convicts' relatives. In particular, the applicant received 20 parcels (up to 10 kg each) over a period of three and a half years of detention. He received no medicines from his relatives, since it was prohibited to provide such items to prisoners. Furthermore, while in the hospital of Penitentiary No. 5, he was found to be suffering from a very low level of albumin, which proved that he was not receiving enough meat, fat, milk, etc. in his daily nourishment. He stated that the State had introduced a daily financial norm for the nourishment of inmates, amounting to UAH 1.77 (EUR 0.33). The medical expenditure for those infected with tuberculosis was fixed at UAH 13 (EUR 2).

4. The Court's assessment

101. The Court considers that there are essentially three elements in the applicant's complaints under Article 3 of the Convention which require consideration on their merits:

- firstly, the applicant's complaints regarding overcrowding in his prison cells;
- secondly, the applicant's complaints regarding the domestic authorities' failure to prevent, diagnose and cure his tuberculosis in due time;
- thirdly, the applicant's complaints regarding the lack of proper nutrition, ventilation, daily walks or conditions of hygiene and sanitation.

(a) Overcrowding in prison cells

102. In the present case, the Court notes that during the period in which the applicant was detained in Vinnytsia Prison No. 1, namely from 29 September to 18 October 2000, his cell measured 44.7 m². Between 15 prisoners (according to the Government) and up to 60 prisoners (according to the applicant) were held in it. The applicant submitted that each of the detainees had between 1 and 1.5 m² of personal space (2.98 m² according to the Government). As to the applicant's conditions of detention in Penitentiary No. 316/83, from 31 October 2000 to 19 April 2001, he was held in a dormitory with 32 other inmates. The applicant's conditions of detention were the same in Snigurivska Penitentiary No. 5. During his stay in these penitentiaries he had approximately 2-2.5 m² of living space (as established by the legislation).

103. The Court does not find it necessary to resolve the disagreement between the Government and the applicant on the particular measurements of the cells. The figures submitted suggest that at any given time there was 1-2.5 m² of space per inmate in the applicant's cell. In this connection the Court recalls that the CPT set 7 m² per prisoner as an approximate, desirable guideline for a detention cell (see the 2nd General Report - CPT/Inf (92) 3, § 43), i.e. 56 m² for 8 inmates (see paragraph 47 above). Thus, in the Court's view, the cells in which the applicant was detained were continuously and

severely overcrowded. This state of affairs in itself raises an issue under Article 3 of the Convention (see the judgment in *Kalashnikov v. Russia*, no. 47095/99, § 97, ECHR 2002-VI).

(b) The alleged failure by the domestic authorities to prevent, diagnose and cure the applicant's tuberculosis

104. The Court notes that, from the parties' submissions, it appears that the applicant was diagnosed by a doctor as having contracted tuberculosis almost two and half months after he first complained about shortness of breath and phlegm (see paragraph 33 above). The Court finds that the incorrect provisional diagnoses of 13 and 14 April 2001 confirm the applicant's claims as to the inadequacy of the medical care provided and the failure to detect his tuberculosis rapidly, or to isolate him and provide him with adequate and timely treatment (see paragraphs 33 and 34 above).

105. Furthermore, on arrival at Penitentiary No. 316/83, he did not undergo the required medical check for possible tuberculosis (see paragraph 29 above). Prior to detention, the applicant had not been suffering from any form of lung disease (as ascertained at his examination on 29 September 2000; see paragraph 25 above). After being diagnosed with tuberculosis in June 2001, he was examined more regularly and transferred to a special penitentiary institution for inmates suffering from tuberculosis, where he was treated for this disease and the prevention of its recurrence until 11 August 2003. The applicant's health only started improving in October 2001. However, the lengthy treatment for tuberculosis led to side-effects, such as sight impairment (*погіршення зору*) and dizziness (paragraph 38 above).

106. In the Court's view, the aforementioned circumstances lead to the conclusion that the applicant was not provided with adequate or timely medical care, given the seriousness of the disease and its consequences for his health.

(c) Lack of proper nutrition, ventilation, daily walks and adequate conditions of sanitation and hygiene

107. The Court observes that, although the applicant was allowed outdoor activity for one hour a day at Vinnytsia Prison No. 1, the rest of the time he was confined to his cell, with very limited space for himself. As to his detention in Penitentiary No. 5, the Court notes that the applicant had unlimited access to the outdoor quarters. However, the fact that the applicant had only once-weekly access to a shower and that his linen and clothes could be washed only once a week raises concerns as to the conditions of hygiene and sanitation, given the acutely overcrowded accommodation. Such conditions would have had an aggravating effect on his poor health.

108. As to the applicant's complaints concerning inadequate nutrition, the Court observes that the parties have agreed that the level of nutrition complied with the statutory norms. In the absence of proof to the contrary, it assumes that the applicant received adequate nutrition. His food was supplemented by parcels from his relatives.

109. Taking the aforementioned factors into account, the Court concludes that the applicant's conditions of hygiene and sanitation were unsatisfactory and would have contributed to the deterioration of his poor health.

(d) The Court's conclusions

110. The Court finds in the present case that there is no indication that there was a positive intention of humiliating or debasing the applicant, or an intention to subject him to treatment contrary to Article 3 of the Convention. However, the absence of any such purpose cannot exclude a finding of violation of Article 3 (see *Peers v. Greece*, no. 28524/95, § 74, ECHR 2001-III). It considers that the applicant's conditions of detention from 28 September 2000 until the present day (more than 5 years) must have caused him considerable mental and physical suffering, diminishing his human dignity and arousing in him such feelings as to cause humiliation and debasement.

111. In the light of the above conclusions as to overcrowding, inadequate medical care and unsatisfactory conditions of hygiene and sanitation (paragraphs 103, 106 and 109 above), the Court finds that, taken together with their duration, the applicant's detention in such conditions amounted to degrading treatment.

112. Accordingly, there has been a violation of Article 3 of the Convention.

B. Compliance with Article 13 of the Convention

113. The Court points out that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see, among many other authorities, the *Kudła v. Poland* judgment cited above, § 157).

114. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be effective in practice as well as in law.

115. Taking into account its earlier considerations as to the exhaustion of domestic remedies (paragraphs 68-74 above), the Court finds that the Government have not shown that it was possible under Ukrainian law for the applicant to complain about the conditions of his detention or that the remedies available to him were effective, i.e. that they could have prevented violations from occurring or continuing, or that they could have afforded the applicant appropriate redress.

116. The Court concludes, therefore, that there has been a violation of Article 13 of the Convention on account of the lack of an effective and accessible remedy under domestic law for the applicant's complaints in respect of his treatment in and conditions of detention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

117. 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

118. The applicant claimed "UAH 3,000 thousand" (three million hryvnias)[1] in respect of pecuniary damage, based on the value of the parcels sent to him while he was detained. He also claimed UAH 483,625[2] in compensation for non-pecuniary damage, including loss of salary and moral suffering.

119. The Government disagreed, stating that the claims were unsubstantiated and exorbitant.

120. The Court notes that there has apparently been an error in the applicant's claim for pecuniary damage, which should be read as UAH 3,000[3]. However, it recalls that it has found earlier that the applicant received adequate nutrition while being detained (see paragraph 108 above) and found no violation in that respect (see paragraphs 109 and 111 above). It therefore rejects the applicant's claim for pecuniary damage (compare and contrast *Nevmerzhitsky v. Ukraine*, no. 54825/00, § 142, ECHR 2005-... (extracts)).

121. As to non-pecuniary damage, the Court recalls its findings above of violations of Articles 3 and 13 of the Convention in the present case. Having regard to its case-law in comparable cases, and deciding on an equitable

1. EUR 488,335.
2. EUR 78,723.6.
3. EUR 488.34.

basis, the Court awards the applicant EUR 10,000 under this head (cf. *Peers v. Greece*, no. 28524/95, § 88, ECHR 2001-III, and *Khokhlich v. Ukraine*, no. 41707/98, § 228, 29 April 2003).

B. Costs and expenses

122. The applicant, whilst noting that his representative received EUR 400 through the Court's legal aid scheme, which covered the cost of correspondence and preparing submissions, requested an additional sum for his lawyer's fees.

123. The Government disagreed.

124. The Court notes that it is clear that the applicant incurred legal fees and bore some expenses in excess of the legal aid he received. Regard being had to the information in its possession and deciding on an equitable basis, it awards the applicant an additional EUR 500 for costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the applicant's complaints under Articles 3 and 13 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 3 of the Convention;

3. *Holds* that there has been a violation of Article 13 of the Convention;

4. *Holds*

   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following sums, to be converted into the national currency of the respondent State at the rate applicable on the date of payment:

      (i) EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage;

      (ii) EUR 500 (five hundred euros) for costs and expenses;

      (iii) plus any tax that may be chargeable on the above amounts;

(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 28 March 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. NAISMITH
Deputy Registrar

J.-P. COSTA
President