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

THIRD SECTION

CASE OF KHUDOBIN v. RUSSIA

(Application no. 59696/00)

JUDGMENT

STRASBOURG

26 October 2006

FINAL

26/01/2007

.

In the case of Khudobin v. Russia,

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

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr C. BÎRSAN,
Mr A. KOVLER,
Mr V. ZAGREBELSKY,
Mrs A. GYULUMYAN,
Mr DAVID THÓR BJÖRGVINSSON, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 6 July and 5 October 2006,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 59696/00) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Viktor Vasilyevich Khudobin ("the applicant"), on 29 October 1999.

2. The applicant was represented by Ms K. Kostromina, a lawyer practising in Moscow. The Russian Government ("the Government") were represented by Mr P. Laptev, the Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that he had not received adequate medical treatment while in a remand prison, that the conditions of his detention had been inhuman and degrading, that his pre-trial detention had exceeded a reasonable time, that his applications for release had been examined with significant delays or not examined at all, and, finally, that his conviction had been based entirely on evidence obtained as a result of police incitement.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 3 March 2005 the Court declared the application partly admissible.

6. The applicant and the Government each filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1979 and lives in Moscow.

A. Circumstances leading to the arrest of the applicant

8. On 29 October 1998 Ms T., an undercover police agent, called the applicant and said that she wished to buy a dose of heroin. The applicant agreed to procure it and, accompanied by Mr M., met Ms T. in the street. Ms T. handed the applicant banknotes, given to her by police officers S. and R. and marked with a special substance (which was visible only under ultra-violet light). The applicant took the money and went to the house of another person, Mr G. The latter gave the applicant a sachet containing 0.05 grams of heroin. On his return to the meeting place with the purported buyer, the applicant was apprehended by the police officers, who had waited for him in the street.

9. The applicant was brought to the local police station where his fingers were examined under ultraviolet light: they bore traces of the substance used by the police to mark the banknotes. Ms T., in the presence of two attesting witnesses, handed the sachet to the police officers, explaining that she had received it from the applicant. The sachet was placed in a container, which was sealed, signed by the attesting witnesses and sent for forensic examination. The applicant was placed overnight in the police station's detention facility.

B. The applicant's detention pending investigation and trial

10. On 30 October 1998 a criminal case was opened and the applicant was charged with drug trafficking. On the same day the prosecutor of the North-Eastern District of Moscow, referring to the circumstances of the applicant's apprehension, the gravity of the charges against him and the risk of absconding, ordered that he be placed in detention on remand. The applicant was transferred to pre-trial detention facility no. 48/1, Moscow.

11. The pre-trial investigation was completed and on 24 December 1998 the case file with the bill of indictment was referred to the Moscow Butyrskiy District Court for trial. On 29 December 1998 an application for release, pending before the Preobrazhenskiy District Court, was forwarded to the Butyrskiy District Court on the ground that the bill of indictment had been transferred to that court and that it should therefore deal with all aspects of the applicant's case. The applicant's lawyer appealed against this

decision, but on 3 February 1999 the Moscow City Court dismissed the appeal.

12. At a preparatory hearing on 13 January 1999 the court ruled that the applicant should remain in custody pending trial, without giving any reasons for that decision.

13. On 18 February 1999 the applicant's father filed a fresh application for release with a court, claiming that the applicant's very poor state of health was incompatible with his detention conditions and, in particular, with the level of medical assistance available in the pre-trial detention centre.

14. On 17 March 1999 the court extended the applicant's detention pending trial. No reasons for that decision were adduced.

15. On 21 April 1999 the applicant's father filed a new application for release with the district court, referring again to his son's health problems. According to the applicant's submissions, the defence repeated this request on 26 and 27 July 1999. The Government claimed that the motion dated 27 July 1999 was received by the court only on 2 August 1999.

16. On 27 July 1999 the court decided that a fresh examination of the applicant's mental health was required. It adjourned the case and decided that the applicant should remain in prison in the meantime. No reasons were given for that decision.

17. On 30 July 1999 the applicant's lawyer appealed against the trial court's ruling of 27 July 1999. He challenged the trial court's decisions to adjourn the case and to order a fresh examination of the applicant's mental health, which had the effect of prolonging the applicant's detention in the difficult conditions of the detention facility. He made the following request:

> "Under Article 331 of the Code of Criminal Procedure, I [hereby] request the [Moscow City] Court to quash the decision of the Butyrskiy District Court concerning adjournment of the case against V.V. Khudobin, the appointment of an additional psychiatric examination [of the applicant] and the refusal [to grant] his application for release."

The appeal was addressed to the Moscow City Court and, as required by domestic law, was sent through the registry of the trial court. The registry received the appeal on 4 August 1999. However, it appears that it was never forwarded to the appellate court for examination.

18. On 17 August 1999 the applicant's legal representatives filed a similar appeal, which was received by the registry on the following day. On 1 September 1999 the applicant's lawyer sent a letter to the trial court in which he sought an explanation as to what had happened to his appeal of 30 July 1999. He received no reply to this letter.

19. On 15 September 1999 the applicant's parents complained to a deputy president of the Moscow City Court and to the Supreme Court of the Russian Federation about the applicant's continued detention. The materials of the case file do not contain any reply to these appeals.

20. On 17 September 1999 the applicant's representative requested the trial court to release the applicant. The defence again referred to the deterioration in the applicant's health and, in particular, to the repetitive pneumonias the applicant had contracted in the previous three months.

21. The applicant remained in detention until 11 November 1999, when the court discontinued the criminal proceedings (see below) and released him.

C. The applicant's health problems while in detention

22. Since 1995-1997 the applicant has suffered from many chronic diseases, such as epilepsy, pancreatitis, chronic viral hepatitis B and C and various mental deficiencies. The doctors who examined the applicant in 1995 recommended out-patient psychiatric supervision and treatment by anticonvulsants. It appears that by the time of his arrest in October 1998 the applicant had a certain history of drug use, including intravenous heroin use.

23. Immediately after his transfer to the detention centre on 30 October 1998 the applicant was subjected to a comprehensive medical examination, including an HIV test, a drug test and psychiatric examination. The drug test revealed that the applicant was intoxicated with morphine. A panel of psychiatrists confirmed the previous diagnoses but found him legally capable of being held accountable for the alleged offences. On 10 November 1998 the first results of the applicant's blood test were received. According to the report by the forensic laboratory, the applicant was HIV-positive.

24. On 30 November 1998 a psychiatrist re-examined the applicant and found him to be capable of being held legally accountable. On an unspecified date in December 1998 the facility administration received the applicant's medical records for the period prior to his arrest, in which the necessary treatment was indicated. In particular, the applicant was prescribed anticonvulsants (*финлепсин, конвулекс*) and anti-hepatitis therapy (*рибоксин, парсил*).

25. On 23 December 1998 the applicant underwent a new medical examination, which confirmed the previous diagnoses and stated that the applicant "was able to participate in the trial and take part in investigative actions".

26. While in detention, the applicant suffered from acute pneumonia, epileptic seizures, bronchitis, hepatitis, pancreatitis, and other serious diseases. Owing to his ailments the applicant was on many occasions placed in the unit for contagious patients in the pre-trial detention centre's hospital. As reported by the detention facility's administration, the applicant was in the centre's hospital from 24 December 1998 to 22 March 1999, from 20 April to 18 May 1999, from 19 July to 12 August 1999 and from 17 to 28 September 1999.

27. On many occasions the defence informed the court, the administration of the detention facility and other State authorities about the applicant's serious health problems. Thus, on 18 January 1999 the defence requested a thorough medical examination of the applicant. On 22 January 1999 the applicant's father asked the facility administration to order a fresh examination of the applicant by an independent doctor, hired by the defence. However, the facility administration refused this request.

28. During the trial the applicant underwent three psychiatric examinations. On 15 June 1999 the doctors concluded that the applicant had been legally insane when committing the incriminated acts. The report stated, in particular, that the applicant "suffered from a chronic mental disease in the form of epilepsy with polymorphous seizures and comparable psychic problems and with evident psychic modifications, with a tendency to drug use". The report of 19 October 1999 confirmed that the applicant was legally insane and needed compulsory treatment.

1. The applicant's submissions

29. At about 10.40 p.m. on 26 April 1999 the applicant had an epileptic seizure. As follows from a written statement signed by his cell-mates, they had to unclench the applicant's teeth with a wooden spoon in order to prevent him from suffocating. The paramedic on duty then arrived and gave the applicant's cell-mates a syringe containing an unknown substance, which they injected in the applicant's buttocks. The applicant's father complained about this fact to the facility administration, which replied that the applicant had received medical aid "in the room for medical procedures".

30. In May 1999 the applicant contracted measles and pneumonia. On 26 June 1999 he had another epileptic seizure. He was transferred to the detention centre's psychiatric facility, where he remained for some time under out-patient supervision and received anticonvulsants. In his letter of 2 August 1999 to the Ombudsman, the applicant's father indicated that on 6 July 1999 the applicant had had another epileptic seizure but had received no medical assistance.

31. On 15 July 1999 the applicant fell ill with bronchopneumonia. According to the applicant's father, facility doctors began treatment only ten days after the symptoms had appeared.

32. On 17 July 1999 the applicant was administered a blood test in the facility hospital against his will. His father complained to the facility administration. The administration replied, by letter of 16 August 1999, that the blood sample had been taken using a disposable needle.

33. On 21 July 1999 the applicant's father complained to the Ministry of Justice about his son's conditions of detention and the lack of appropriate medical treatment. On 27 July 1999 he filed a similar complaint to the Butyrskiy District Court, also seeking the applicant's release. According to

the applicant's father, the applicant was repeatedly transferred from one cell to another, in spite of a high temperature (40 C°) and fever, and did not receive adequate treatment for pneumonia. He spent three days in a cell with purulent patients and slept on the floor on account of a shortage of sleeping places. The facility doctors did not establish the applicant's immunological and biochemical status, or the possible causes of his persistent fever. The applicant's father wanted to deliver a multi-vitamin medicine to him but the facility administration refused to accept it.

34. The court dismissed the application for release. On the same day, on a motion by the prosecutor, the court ordered a new expert examination of the applicant's mental health on the ground that the previous one, while recognising the applicant as legally insane, did not specify whether his state of mental health required compulsory medical treatment.

35. In August 1999 the applicant's mother complained to the Ministry of Justice about the applicant's conditions of detention and, specifically, about the lack of adequate medical assistance.

2. The Government's submissions

36. According to the Government, from 20 April to 18 May 1999 the applicant underwent in-patient medical treatment in the detention facility's hospital. He was supervised by a "doctor in charge" and received "total restorative treatment and vitamin therapy". Cell no. 735, where the applicant was detained, was equipped with six berths, a lavatory, hot and cold water taps and ventilation. The applicant was provided with bedding, tin ware, meals three times a day and items for personal hygiene. The number of detainees never exceeded the number of berths.

37. The Government confirmed that on 26 April 1999, at about 10:40 p.m., the applicant had had a seizure. Immediately thereafter he was examined by a doctor, who took the applicant's pulse, sounded his heart, measured his blood pressure, palpated the abdomen and administered an intramuscular shot of aminazine. On the following day the applicant underwent further medical examination.

38. The applicant was discharged from hospital in a satisfactory state of health. On 26 June 1999 the applicant was placed in cell no. 353, in the prison hospital's psychiatric department. He was supervised by a doctor and received "preventive medical assistance". This cell was also properly equipped and was not overcrowded.

39. According to a certificate dated 23 April 2004 from the deputy head of the medical department, the applicant had no epileptic seizures during his stay in the psychiatric department of the prison hospital. In the psychiatric hospital anticonvulsant treatment was administered.

40. The Government produced copies of three medical certificates, dated 29 January, 25 February and 27 April 1999. They contained the following relevant entries.

41. The first certificate stated that the applicant was HIV-positive, suffered from epilepsy and had had one epileptic seizure during his stay in the facility hospital. His state of health was assessed as "satisfactory". Any additional medical examinations were to be ordered by the investigative authorities.

42. The second certificate of 25 February 1999 stated that the applicant was HIV-positive and was suffering from chronic hepatitis B and C and from epilepsy. Further, there was no record of any epileptic seizure from 30 to 31 October 1998. On 18 February 1999 the applicant consulted a psychiatrist and a neurologist. He was discharged from hospital at the prosecuting authorities' request in a "satisfactory" condition, which did not prevent him from participating in the proceedings.

43. The third certificate of 27 April 1999 indicated that the applicant was HIV-positive and was suffering from measles and epilepsy. It further stated that "at the present moment the [applicant's] state of health is relatively satisfactory" and that the applicant would be fit to participate in the proceedings in May 1999.

44. The Government also produced a collection of documents which appeared to be extracts from the applicant's medical record. Most pages were illegible. The legible pages listed the applicant's diagnoses but contained no information about the nature of treatment administered to the applicant in the detention facility's hospital.

D. Examination of the applicant's case on the merits

45. On 30 December 1998 the Butyrskiy District Court received the case-file from the prosecutor. The first preparatory hearing took place on 13 January 1999. In the following months the court held several hearings where various procedural matters were decided upon. Thus, on 17 March 1999 the court commissioned a fresh expert examination of the applicant's mental health and adjourned the case. The expert report was ready by 15 June 1999; it found that the applicant was insane but did not contain any recommendations as to possible compulsory medical treatment. On 27 July 1999 the court commissioned another psychiatric examination of the applicant and adjourned the examination of the case.

46. The first hearing on the merits took place on 11 November 1999 in the presence of the applicant's lawyer. The applicant was not present. At the lawyer's request, the court admitted several persons to participate in the proceedings as the applicant's representatives, including Ms Kostromina. They were given thirty minutes to read the case file. The applicant's lawyer asked for an adjournment because several witnesses, including G., who had sold heroin to the applicant, and S. and R., the policemen involved in the operation, had failed to appear. However, the court decided to proceed.

47. The defence team's arguments before the trial court can be summarised as follows. The defence contended that applicant had been incited to commit an offence by Ms T., acting on behalf of the police. According to the defence, Russian law prohibited any form of incitement or provocation; only if a specific crime was being prepared could an undercover operation be carried out. In the present case, however, the police had no proof of the applicant's involvement in drug trafficking when planning the "test buy".

48. They further stressed that the applicant's confession had been given in a state of drug intoxication and without legal advice. Finally, the defence challenged the credibility of the forensic examination report which identified the substance confiscated and allegedly sold by the applicant to Ms T. as heroin. They referred to a declaration signed by the applicant on 15 October 1999, stating that the confession had been extracted from him by force.

49. At the hearing on 11 November 1999 Ms T. gave evidence against the applicant. She testified that she had helped the police voluntarily. She explained that she had handed the applicant over to the police "out of kindness in a manner of speaking" (*так сказать, по доброте душевной*) [*sic*]. She also stated as follows: "At that time I did not know where to get heroin, so I called [the applicant] because in the past he had already procured it for me".

50. The court also heard Mr M., who was with the applicant at the moment of his arrest and who confirmed, in principle, Ms T.'s account of the facts. However, he said that before the events at issue he had procured drugs for himself from another source. Finally, the court interviewed the applicant's mother, who described her son's character. She testified that she did not know when her son had started to take drugs.

51. The District Court examined the documents, exhibits and expert reports contained in the case file. In particular, it examined the police report describing the "test buy" and the findings of the psychiatric examination.

52. On the same day the Butyrskiy District Court found the applicant guilty of selling heroin to Ms T. on 28 October 1998. It also ruled, referring to the psychiatric report of 19 October 1999, that the applicant had committed the crime in a state of insanity and could not therefore be held criminally accountable. The court discontinued the criminal proceedings and ordered compulsory medical treatment of the applicant at his home. The applicant was released from custody.

53. The applicant's representative appealed, claiming that the applicant was not guilty and maintaining, *inter alia*, that the police had fabricated the crime. In particular, there was no reliable evidence that the applicant had already been suspected by the police of being a drug-dealer at the moment of his arrest. Moreover, the applicant had derived no financial benefit from the transaction as he had given Mr G. all the money that he had received

from T. for the sachet. Furthermore, the court failed to interview several key witnesses, including the two police officers who had arrested the applicant, two eye-witnesses to his arrest and Mr G., who had sold the substance to the applicant. Finally, the applicant's representatives claimed that the confession had been extracted from the applicant by force.

54. On 11 January 2000 the Moscow City Court dismissed the appeal. The applicant was absent but his lawyer and representatives took part in the appeal proceedings.

55. On 12 April 2004 the Butyrskiy District Court of Moscow, on a motion by psychoneurotic hospital no. 19, Moscow, ordered that the applicant's compulsory medical treatment be discontinued.

II. RELEVANT COUNCIL OF EUROPE DOCUMENTS

56. The relevant extracts from the 3rd General Report [CPT/Inf (93) 12] by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") read as follows:

> **"a. Access to a doctor**
>
> ... 35. A prison's health care service should at least be able to provide regular out-patient consultations and emergency treatment (of course, in addition there may often be a hospital-type unit with beds). ... Further, prison doctors should be able to call upon the services of specialists. ...
>
> Out-patient treatment should be supervised, as appropriate, by health care staff; in many cases it is not sufficient for the provision of follow-up care to depend upon the initiative being taken by the prisoner.
>
> 36. The direct support of a fully-equipped hospital service should be available, in either a civil or prison hospital. ...
>
> 37. Whenever prisoners need to be hospitalised or examined by a specialist in a hospital, they should be transported with the promptness and in the manner required by their state of health."
>
> **b. Equivalence of care**
>
> 38. A prison health care service should be able to provide medical treatment and nursing care, as well as appropriate diets, physiotherapy, rehabilitation or any other necessary special facility, in conditions comparable to those enjoyed by patients in the outside community. Provision in terms of medical, nursing and technical staff, as well as premises, installations and equipment, should be geared accordingly.
>
> There should be appropriate supervision of the pharmacy and of the distribution of medicines. Further, the preparation of medicines should always be entrusted to qualified staff (pharmacist/nurse, etc.).

39. A medical file should be compiled for each patient, containing diagnostic information as well as an ongoing record of the patient's evolution and of any special examinations he has undergone. In the event of a transfer, the file should be forwarded to the doctors in the receiving establishment.

Further, daily registers should be kept by health care teams, in which particular incidents relating to the patients should be mentioned. Such registers are useful in that they provide an overall view of the health care situation in the prison, at the same time as highlighting specific problems which may arise.

40. The smooth operation of a health care service presupposes that doctors and nursing staff are able to meet regularly and to form a working team under the authority of a senior doctor in charge of the service."

III. RELEVANT DOMESTIC LAW

A. Criminal liability for drug trafficking

57. Article 228 § 1 of the Criminal Code punishes the unlawful procurement of drugs without an intent to supply. Article 228 § 4 punishes the unlawful supply of drugs in large quantities.

58. Pursuant to Article 21 ("Insanity") of the Criminal Code, a person who was insane at the time of committing a socially dangerous act as a result of chronic or temporary mental derangement, mental deficiency or any other mental condition shall not be subject to criminal liability. In such cases the court, by an interim decision (*определение*), discontinues the proceedings and discharges the defendant from criminal liability or penalty, and may order that the defendant undergo compulsory medical treatment (Article 410 of the Code of Criminal Procedure). However, if the court finds that there is insufficient indication of the defendant's guilt, the proceedings should be discontinued on that ground. The court may in this case still prescribe compulsory medical treatment.

B. Investigative techniques

59. Article 6 of the Operational Search Activities Act of 5 July 1995, with further amendments, lists a number of intrusive techniques which may be used by law enforcement or security authorities for the purpose of investigating crimes. Under Article 6 § 1 (4) of the Act, the police may carry out a "test buy" (*проверочная закупка*) of prohibited goods (such as drugs).

60. According to Article 7 § 2-1 of the Act, in order to initiate a "test buy" the police should have certain preliminary information that a crime is being planned or that it has been already committed. A test buy is initiated

by a written order from the head of the relevant police unit. Judicial control is provided if the "test buy" involves interference with the home, correspondence and other constitutionally protected rights. The formal requirement is completion of a "protocol", in which the results of the test buy are determined. This "protocol" can be used as evidence in the criminal proceedings. The Act contains other possible situations in which a "test buy" can be carried out (such as where a criminal investigation has been started, where a request for a "test buy" was received from the judicial or prosecution authorities, etc.); however, these are not relevant to the present case.

C. Detention on remand

1. Grounds for the detention

61. The "old" Code of Criminal Procedure (CCrP, in force until 2002), provided for a number of interim measures warranting the defendant's appearance at the trial and proper administration of justice. Those "preventive measures" or "measures of restraint" (*меры пресечения*) include an undertaking not to leave a town or region, personal security, bail or detention on remand (Article 89 of the old CCrP).

62. Under the old CCrP, a decision ordering detention on remand could be taken by a prosecutor or a court (Articles 11, 89 and 96). When deciding whether to remand an accused in custody, the competent authority was required to consider whether there were "sufficient grounds to believe" that he or she would abscond during the investigation or trial or obstruct the establishment of the truth or re-offend (Article 89 of the old CCrP).

63. Before 14 March 2001, detention on remand was authorised if the accused was charged with a criminal offence carrying a sentence of at least one year's imprisonment or if there were "exceptional circumstances" in the case (Article 96). Under the old Code the competent authority also had to take into account the gravity of the charge, information on the accused person's character, his or her profession, age, state of health, family status and other circumstances (Article 91 of the old CCrP).

2. Time-limits for detention on remand

64. The Code distinguished between two types of detention on remand: the first being "during the investigation", that is while a competent agency – the police or a prosecutor's office – investigated the case, and the second "before the court" (or "during the judicial investigations"), that is, while the case was before a court. Although there was no difference in practice between them (the detainee was held in the same detention facility), the calculation of the time-limits was different.

(a) Time-limits for detention "during the investigation"

65. After arrest the suspect is placed in custody "during the investigation". The maximum permitted period of detention "during the investigation" is two months but it can be extended for up to eighteen months in "exceptional circumstances". Extensions are authorised by prosecutors of ascending hierarchical levels, subject to an appeal to the court. No extension of detention "during the investigation" beyond eighteen months is possible (Article 97 of the old CCrP). The period of detention "during the investigation" was calculated to the day when the prosecutor sent the case to the trial court (Article 97 of the old CCrP).

(b) Time-limits for detention "before the court"/"during the judicial proceedings"

66. From the date the prosecutor forwards the case to the trial court, the defendant's detention is "before the court" (or "during the judicial proceedings"). Before 14 March 2001 the old CCrP set no time-limit for detention "during the judicial proceedings". The duration of the trial was not limited in time (although the judge had to start the trial within a certain time after receiving the case file from the prosecution).

3. Proceedings to examine the lawfulness of detention

(a) During detention "during the investigation"

67. The detainee or his or her counsel or representative can challenge the detention order issued by a prosecutor, and any subsequent extension order, before a court. The judge is required to review the lawfulness of and justification for a detention or extension order no later than three days after receipt of the relevant papers. The judge can either dismiss the challenge or revoke the pre-trial detention and order the detainee's release (Article 220-1 and -2).

68. An appeal to a higher court lay against the judge's decision. It has to be examined within the same time-limit as appeals against a judgment on the merits (Article 331 *in fine*).

(b) During the judicial proceedings

69. On receipt of the case file, the judge had to determine, in particular, whether the defendant should remain in custody or be released pending trial (Articles 222 § 5 and 230 of the old CCrP) and rule on any application by the defendant for release (Article 223 of the old CCrP). If the application was refused, a fresh application could be made once the trial has commenced (Article 223 of the old CCrP). At any time during the trial the court could order, vary or revoke any preventive measure, including detention on remand (Article 260 of the old CCrP).

70. An appeal against such a decision lay to the higher court. It had to be lodged within ten days and examined within the same time-limit as an appeal against the judgment on the merits (Article 331 of the old CCrP).

D. Lawyer-client relationships; agency of necessity

71. Legal representation of a client in court proceedings is usually governed by the rules of commission or agency contracts (Chapters 49 and 52 of the Civil Code of the Russian Federation). In addition, Chapter 50 of the Code provides for the agency of necessity: a person may act in the interests of another in order to prevent damage to the latter's property, protect or promote his lawful interests, etc. If the actions of a person acting in another's interest without proper mandate are approved by the beneficiary of such acts, this is regarded as an agency agreement between them (Article 982 of the Civil Code). Consequently, the beneficiary should bear the agent's reasonable costs (Article 984 of the Civil Code).

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

72. In 2006, in connection with the question of provision of legal aid to the applicant, the Government objected to Ms Kostromina's participation in the proceedings before the Court. In particular, they indicated that the authority form of 22 March 2000 had been signed by the applicant's mother rather than by the applicant himself. Since at that moment the applicant was already an adult, he should have signed the authority form himself. Furthermore, the authority form did not contain Ms Kostromina's signature, an omission which, in the Government's view, rendered that document invalid. The Government requested the Court either to obtain from the applicant his personal written confirmation of each document submitted on his behalf by Ms Kostromina, or to strike the case out of the list of cases pending before the Court.

73. The Court recalls at the outset that, pursuant to Rule 45 of the Rules of Court, written authorisation is valid for the purposes of proceedings before the Court. Convention practice does not contain special formal requirements for such documents, even though domestic law does (see, most recently, *Nosov v. Russia* (dec.), no. 30877/02, 20 October 2005; see also *Moiseyev v. Russia* (dec.), no. 62936/00, 9 December 2004 and *Isayeva and Others v. Russia* (dec.), nos. 57947/00, 57948/00 and 57949/00, 19 December 2002).

74. As regards the Government's suspicion that the applicant did not grant Ms Kostromina authority to represent him in the Strasbourg proceedings, the Court presumes that both parties to the proceedings, the applicant and the Government alike, act in good faith; a claim seeking to rebut this presumption should be supported by sufficient evidence. As follows from the materials in the case file, Ms Kostromina represented the applicant in the domestic proceedings (see paragraph 46 above). The applicant's mother, who signed the authority form in the name of Ms Kostromina, was also one of the applicant's representatives before the trial court. The applicant himself, as follows from the District Court's decision of 11 November 1998, was mentally ill and needed compulsory treatment. It is natural that in such circumstances the applicant's mother, acting on his behalf, designated Ms Kostromina as his legal representative. Further, the declaration of means signed by the applicant mentioned Ms Kostromina as his representative. Finally, it was not until a very advanced stage of the proceedings that the Government put forward the argument in question.

75. In this context the Court is satisfied that the application was validly introduced and that Ms Kostromina was duly authorised to represent the applicant. The Government's objection on this point must be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

76. Under Article 3 of the Convention the applicant complained about the lack of medical assistance in the pre-trial detention facility and inhuman conditions of detention. Article 3 reads as follows:

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

A. The parties' submissions

77. The Government insisted that the applicant had received all necessary treatment in pre-trial detention, that the cells in the detention facility's hospital had not been overcrowded and that the latter had been properly equipped (see paragraphs 36 et seq. above). Every complaint by the applicant's representatives had been thoroughly examined and reasoned answers were given in a timely manner. On 26 April 1999 the applicant had indeed had a seizure. However, he was immediately examined by the doctor in charge and received qualified medical aid. A written statement signed by the applicant's cell-mates, who had no special medical knowledge, should not be accepted in evidence. The Government concluded that the applicant's complaints under Article 3 were unsubstantiated.

78. The applicant maintained his allegations. He claimed that his description of the conditions of detention and of the medical assistance he had received in the detention facility hospital was accurate (see paragraphs 29 et seq. above). The authorities were fully aware of his illnesses. The applicant's father had inquired about his son's health on many occasions. However, all the replies he received from the facility administration were of a general character and contained no detailed information about the treatment the applicant was receiving for his ailments. The applicant specifically pointed to the incident of 26 April 1999 when he had had an epileptic seizure but no qualified medical assistance had been provided.

B. The Court's assessment

1. Medical assistance

79. The Court notes that the parties presented differing accounts of the medical assistance received by the applicant in the detention facility. Consequently, the Court will begin its examination of the applicant's complaints under Article 3 with the establishment of the facts pertinent to that part of his complaints.

(a) Establishment of facts

80. The Court recalls its case-law confirming the standard of proof "beyond reasonable doubt" in its assessment of the evidence (see *Avsar v. Turkey*, no. 25657/94, § 282, ECHR 2001). Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in a large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. In such cases it is up to the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII). In the absence of such explanation the Court can draw inferences which may be unfavourable for the respondent Government (see *Orhan v. Turkey*, no. 25656/94, § 274, 18 June 2002).

81. In the present case the applicant claimed that he did not receive adequate treatment for his diseases while in detention. However, he has not presented medical documents which would specify the nature of the treatment he actually received while in pre-trial detention, if any.

82. However, the Court reiterates that in certain circumstances the burden of proof may be shifted from the applicant to the respondent Government (see paragraph 80 above). The question which arises is whether this approach can be applied *in casu*. In order to answer this question, the

Court will examine the existing elements of proof and the facts of the case accepted by both parties.

83. First, it is not disputed that at the moment of his arrest the applicant suffered from several chronic diseases, such as epilepsy, pancreatitis, viral hepatitis B and C, as well as various mental deficiencies. He was also HIV-positive. The Government did not deny that these ailments, some of which were life-threatening, had been known to the authorities, and that they had required constant medical supervision and treatment by doctors. The authorities should have kept a record of the applicant's state of health and the treatment he underwent while in detention (see the CPT's General Report on the Standards of Health Care in prisons, cited in paragraph 56 above).

84. The Court notes with concern that during his detention the applicant contracted several serious diseases such as measles, bronchitis and acute pneumonia. He also had several epilepsy seizures. Although his repetitive illnesses may be partly explained by his past medical history, namely the fact that he was HIV-positive, the sharp deterioration of his state of health in the detention facility raises certain doubts as to the adequacy of medical treatment available there (see *Farbtuhs v. Latvia*, no. 4672/02, § 57, 2 December 2004).

85. The Court also observes that the applicant brought his grievances to the attention of the domestic authorities at a time when they could reasonably have been expected to take appropriate measures. The applicant's description of his health problems in his requests was detailed and coherent. The authorities possessed a record of his medical history and were aware of the recommendations made by civilian doctors regarding the medical treatment required.

86. Furthermore, on at least two occasions the applicant's father asked the detention facility administration for an independent medical examination of the applicant's health. However, those requests were refused: as follows from the medical certificate produced by the Government, any subsequent medical examination of the applicant was possible only on the initiative of the investigative authorities. It is quite alarming that the issue of medical examination of the applicant was left to the discretion of the investigative authorities: it was up to the investigator, not the doctors, to decide whether the applicant needed any additional medical examination. In these circumstances it is hard to accept the Government's contention that the applicant did not need any additional medical examination or treatment.

87. Finally, one incident raises special concern, namely that of 26 April 1999. The applicant claimed that on that date his cell-mates had to administer a medicine to him by injection in order to stop an epilepsy seizure. In support of his claim the applicant produced a written statement signed by his cell-mates. The Court takes note of the Government's argument that the statement cannot be accepted in evidence since the

applicant's cell-mates were not medical professionals. However, one does not need to have professional knowledge to say that an injection was not given by a staff member of the prison hospital. There are no reasons to believe that the applicant's cell-mates who signed the statement were lying. The Government, on the other hand, did not produce any record of the incident. Therefore, the Court accepts the applicant's account of events as regards the incident on 26 April 1999. In this respect the Court recalls that the medical assistance provided by non-qualified persons cannot be regarded as adequate (see *Farbtuhs* cited above, § 60).

88. In sum, the combination of the above factors speaks in favour of the applicant's allegation that medical care in the detention facility was inadequate. In these circumstances it was up to the Government to refute them. The Government did not, however, produce any document which would explain what kind of medical treatment was administered to the applicant, when it was given and by whom (see, *mutatis mutandis*, *Ostrovar v. Moldova*, no. 35207/03, § 86, 13 September 2005). The Government's submissions in this respect were vague and poorly substantiated. Thus, the Government in their submissions claimed that the applicant had undergone a "total restorative treatment and vitamin therapy", a very broad expression which requires further amplification. Further, the Government did not make clear whether the applicant had received the medication prescribed by the civilian doctors (see paragraph 24 above). As to the medical certificates and extracts from the applicant's medical records produced by the Government (to the extent that they were legible), these only confirmed the diagnoses but did not contain information as to the nature of the treatment the applicant received or any particular examination he had undergone. Accordingly, the Court considers that the Government have not provided a plausible explanation for the deterioration of the applicant's state of health in the remand facility.

89. The Court therefore accepts the applicant's account of the health conditions and medical assistance he received while in detention. In particular, the Court accepts that in April and July 1999 the applicant had epileptic seizures but did not receive qualified and/or timely medical assistance. Throughout his detention the authorities failed to monitor his chronic diseases and provide adequate medicinal treatment, which aggravated his health condition and increased his vulnerability to other illnesses, namely repetitive pneumonia. On one occasion the applicant, who had a high fever, was placed in a hospital cell with suppurative patients. In July 1999 he fell ill with bronchopneumonia but did not receive treatment until ten days later. The Court will now examine whether these facts, taken together with other relevant circumstances of the case, amounted to "inhuman or degrading treatment", as the applicant suggested.

(b) Examination of the complaint

90. The Court recalls that Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see *Labita v. Italy*, judgment of 6 April 2000, *Reports of Judgments and Decisions* 2000-IV, § 119).

91. The Court further recalls that, according to its case-law, 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). Although the purpose of such treatment is a factor to be taken into account, in particular the question of whether it was intended to humiliate or debase the victim, the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Article 3 (*Peers v. Greece*, no. 28524/95, § 74, ECHR 2001-III).

92. In exceptional cases, where the state of a detainee's health is absolutely incompatible with detention, Article 3 may require the release of such a person under certain conditions (see *Papon v. France (no. 1)* (dec.), no. 64666/01, CEDH 2001-VI ; *Priebke v. Italy* (dec.), no. 48799/99, 5 April 2001) 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).

93. However, Article 3 cannot be construed as laying down a general obligation to release detainees on health grounds. It rather imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty. The Court accepts that the medical assistance available in prison hospitals may not always be at the same level as in the best medical institutions for the general public. Nevertheless, the State must ensure that the health and well-being of detainees are adequately secured by, among other things, providing them with the requisite medical assistance (see *Kudła v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI; see also *Hurtado v. Switzerland*, judgment of 28 January 1994, Series A no. 280-A, opinion of the Commission, pp. 15-16, § 79; and *Kalashnikov v. Russia*, no. 47095/99, §§ 95 and 100, ECHR 2002-VI). In *Farbtuhs*, cited above, the Court noted that if the authorities decided to place and maintain a [seriously ill] person in detention, they should demonstrate special care in

guaranteeing such conditions of detention that correspond to his special needs resulting from his disability (§ 56).

94. Turning to the present case, the Court recalls that the evidence from various medical sources confirmed that the applicant had several serious medical conditions which required regular medical care. However, nothing suggests that his diseases were in principle incompatible with detention. The detention facility had a medical unit, where the applicant was placed on several occasions, and his diseases could presumably have been treated in that unit.

95. At the same time the Court refers to its finding that the applicant did not receive the requisite medical assistance. Even while in the prison hospital, he clearly suffered from the physical effects of his medical condition. As to the mental effects, he must have known that he risked at any moment a medical emergency with very serious results and that no qualified medical assistance was available (see paragraphs 29 et seq. above). Not only was the applicant refused appropriate medical assistance by the detention centre authorities, but he was also denied the possibility to receive it from other sources (see paragraph 27 above). This must have given rise to considerable anxiety on his part.

96. What is more, the applicant was HIV-positive and suffered from a serious mental disorder. This increased the risks associated with any illness he suffered during his detention and intensified his fears on that account. In these circumstances the absence of qualified and timely medical assistance, added to the authorities' refusal to allow an independent medical examination of his state of health, created such a strong feeling of insecurity that, combined with his physical sufferings, it amounted to degrading treatment within the meaning of Article 3.

97. There has accordingly been a violation of Article 3 of the Convention in this respect.

2. General conditions of detention

98. As regards the applicant's complaint about the general conditions of detention in the detention facility no. 48/1 of Moscow and the hospital unit of that facility, the Court considers that, in view of its findings under Article 3 concerning the lack of medical assistance there, it is not necessary to examine the complaint about general conditions of detention separately.

III. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

99. The applicant complained that his continuing detention on remand exceeded a reasonable time and was unjustified. He referred in this respect to Article 5 § 3 of the Convention, which reads as follows:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

A. The parties' submissions

100. The Government argued that the applicant's continued detention had been necessary because of the gravity of the charges against him, his character and the risk of his absconding. The applicant was charged with serious crimes carrying a possible sentence of more than thirteen years' imprisonment. The first detention order, imposed by the prosecution authorities on the applicant on 20 October 1998, referred to the danger of absconding, and all subsequent detention orders were implicitly based on that ground as well. The applicant's state of health was not so serious as to outweigh considerations of public interest calling for the continuation of his detention on remand. The extensions of the applicant's detention were needed, in particular, to carry out expert examinations of the applicant's mental state. Thus, the applicant's detention on remand did not exceed a reasonable time.

101. The applicant maintained his arguments. He replied that his continued detention had not been necessary. There was no danger of absconding, re-offending, or interfering with the course of justice, and the gravity of the charges alone could not justify his detention. He suffered from many illnesses and had a permanent place of residence and occupation (he was a student). Furthermore, the courts did not give any reasons why they considered that such a danger existed. There was no serious evidence of guilt as the accusations were based on police provocation; there was no risk of re-offending; and the applicant's precarious health called for his immediate release. The extensions of his detention on remand were related to the repeated psychiatric examinations of his mental health.

B. The Court's assessment

102. At the outset the Court notes that the applicant's detention on remand lasted from 29 October 1998, the date on which he was apprehended, until 11 November 1999, the day when the court pronounced its judgment in his case and the applicant was released. The total duration thus amounted to one year and 23 days.

1. General principles

103. A person charged with an offence must always be released pending trial unless the State can show that there are "relevant and sufficient" reasons to justify the continued detention (see *Wemhoff v. Germany*,

judgment of 27 June 1968, Series A no. 7, § 12; *Yagci and Sargin v. Turkey*, judgment of 8 June 1995, Series A no. 319-A, § 52).

104. The Convention case-law has developed four basic acceptable reasons for refusing bail: the risk that the accused will fail to appear for trial (see *Stögmüller v. Austria*, judgment of 10 November 1969, Series A no. 9, § 15); and the risks that the accused, if released, would take action to prejudice the administration of justice (see *Wemhoff*, cited above, § 14), commit further offences (see *Matznetter v. Austria*, judgment of 10 November 1969, Series A no. 10, § 9) or cause public disorder (see *Letellier v. France*, judgment of 26 June 1991, Series A no. 207, § 51).

105. It falls in the first place to the national judicial authorities to determine whether, in a given case, the pre-trial detention was necessary (see *Nikolov v. Bulgaria*, no. 38884/97, § 74, 30 January 2003). The Court's power of review of the domestic courts' findings in this context is very limited: only if the domestic authorities' reasoning is arbitrary or lacks any factual ground may the Court intervene and find that the detention was unjustified.

2. Application to the present case

106. The Court notes that the initial detention order of 30 October 1998, imposed by the prosecution, was based on the gravity of charges against the applicant and the alleged risk of absconding. However, the courts gave no reasons while extending the applicant's detention or dismissing several applications for release lodged by the defence.

107. Thus, the Court reiterates that, although the persistence of a reasonable suspicion is a condition *sine qua non* for the initial detention, after a certain lapse of time it no longer suffices (see, as a classic authority, *Labita v. Italy* [GC], no. 26772/95, § 153, ECHR 2000-IV). The Court accepts that a reasonable suspicion against the applicant could have warranted the initial detention. It recalls, however, that the gravity of the charge cannot by itself serve to justify long periods of detention pending trial. Nor can it be used to anticipate a custodial sentence (see *Rokhlina v. Russia*, no. 54071/00, § 66, 7 April 2005; *Panchenko v. Russia*, no. 45100/98, § 102, 8 February 2005; and *Letellier,* cited above). The Court notes in this respect that after 30 October 1998 the applicant's detention was extended several times and lasted over a year. Moreover, in December 1998 the investigation was completed and the case was transferred to the trial court. In the Court's view, in these circumstances the domestic authorities should have adduced new reasons to justify the applicant's continued detention.

108. As to the reasons mentioned by the Government in their observations, namely the danger of absconding and the applicant's "character", the Court recalls that it is essentially on the basis of the reasons given in the domestic courts' decisions and of the facts stated by the

applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 (see *Jablonski v. Poland*, no. 33492/96, § 79, 21 December 2000). In the *Ilijkov v. Bulgaria* case (no. 33977/96, § 86, 26 July 2001) the Court found:

> "Even though facts that could have warranted [the applicant's] deprivation of liberty may have existed, they were not mentioned in the courts' decisions ... and it is not the Court's task to establish such facts and take the place of the national authorities who ruled on the applicant's detention."

The reasons for the applicant's detention referred to by the Government were not mentioned in the domestic courts' decisions, and the Court cannot accept that those reasons transpire from the circumstances of the case. On the other hand, such factors as the applicant's youth, his health problems, the absence of a criminal record, the fact that he had a permanent place of residence and stable family relations called for a careful scrutiny of his applications for release and for their analysis in the judicial decisions. It appears that the lack of reasoning was not an accidental or short-term omission, but rather a customary way of dealing with applications for release. Against this background the Court concludes that the applicant's detention pending investigation and trial was not justified by "relevant and sufficient" reasons.

109. There has therefore been a violation of Article 5 § 3 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

110. The applicant complained about the domestic courts' failure to examine "speedily" his applications for release of 21 April 1999 and 17 September 1999. He also complained that his appeals before the Moscow City Court, lodged on 4 and 17 August 1999, had not been examined. He referred in that respect to Article 5 § 4 of the Convention, which reads as follows:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. ..."

A. The parties' submissions

111. With regard to the belated review of the applicant's requests for release, the Government noted that on 17 March 1999 the court concerned had commissioned an additional examination of the applicant's mental health. The case was consequently adjourned. Thus, the application for release of 21 April 1999 fell during a period when no hearings were held.

As soon as the court received the results of the expert examination, it set a date for the hearing and, at that hearing, examined the application. The same was true with regard to the application for release lodged on 17 September 1999: this was during the period when the court was awaiting the findings of the fourth expert examination of the applicant's mental health. The application of 17 September 1999 was examined at the next hearing on the merits, on 11 November 1999.

112. The Government further argued that at the hearing of 27 July 1999 the defence had not lodged any application for release. The application dated 27 July 1999 was in fact received by the court on 2 August 1999. As regards the applications of 15 and 17 September 1999, lodged with the Deputy President of the Moscow City Court and the President of the Supreme Court respectively, they were referred to the Butyrskiy District Court of Moscow "in the established order and were admitted to the case file".

113. As regards the alleged failure by the Moscow City Court to examine the appeal of 30 July 1999, the Government maintained that it concerned only the need for another expert examination of the applicant's mental health, but not the question of detention.

114. The applicant maintained his complaint, without, however, presenting any relevant arguments. He insisted that the ruling of 27 July 1999 extending his detention had been challenged before the appeal court by his lawyer and his legal representatives, but that it had never been examined.

B. The Court's assessment

1. General principles

115. The Court recalls that Article 5 § 4 provides that "the lawfulness of the detention shall be decided *speedily*" (emphasis added). There are two aspects to this requirement: first, the opportunity for legal review must be provided soon after the person is taken into detention and, if necessary, at reasonable intervals thereafter. Second, the review proceedings must be conducted with due diligence. The Court further recalls that where domestic law provides for a system of appeal, the appellate body must also comply with the requirements of Article 5 § 4 (see the *Grauzinis v. Lithuania* judgment, no. 37975/97, 10 October 2000, §§ 30-32). It concerns, in particular, the speediness of the review by the appellate body of a lower court's decision imposing a detention order.

116. The question whether a person's right to a "speedy review" of his applications for release has been respected will be determined in the light of the circumstances of each case; in complex cases the examination of an application for release make take more time than in simple ones. In

Baranowski v. Poland (no. 28358/95, ECHR 2000-III), it took the domestic courts five months to examine an application for release. The Government showed that the domestic court had commenced the examination of the first application for release as early as the day after it had been submitted and that, subsequently, it had on five occasions adjourned the examination of the relevant applications because evidence had to be taken from three experts. However, despite these arguments, the Court found a violation of Article 5 § 4. In the *Samy v. the Netherlands* case (no. 36499/97, decision of 4 December 2001) concerning aliens' detention for the purposes of expulsion, the Court found that a period of 25 days was compatible with Article 5 § 4. At the same time, in the *Rehbock v. Slovenia* case (no. 29462/95, § 85, ECHR 2000-XII), the Court found that the application for release was examined 23 days after it had been introduced before the first-instance court, and that that was not a "speedy" examination as required by Article 5 § 4. A delay of seventeen days has been declared incompatible with this provision (see *Kadem v. Malta*, no. 55263/00, § 43, 9 January 2003).

2. Application to the present case

(a) As to the delay in the examination of the application for release of 21 April 1999

117. The Court observes that on 17 March 1999 the District Court decided that the applicant was to remain in detention pending trial. It did not, however, specify the reasons for the applicant's continued detention; nor did it establish any time-limit for it. The Court further observes that no limitations on the right of review of the continued detention could be derived from the applicable law (see paragraphs 61 et seq. above): the latter does not establish how often the trial court should return to the issue of a defendant's pre-trial detention. In principle, the defence may lodge as many applications for release as it wishes, every day if preferred. The applicant therefore had no clear indication as to when it would be appropriate to introduce a new application for release.

118. The new application was in fact lodged on 21 April 1999, namely one month after the District Court had pronounced on the matter. In that application the applicant referred to his bad health. In the Court's view, that argument could be regarded as a new circumstance, warranting re-consideration of the detention issue (especially against the background of the lack of reasoning in the preceding judicial decision on detention and given that the applicant had an arguable claim in this respect – see paragraphs 83 and 84 above). In these circumstances the Court concludes that the applicant did not abuse his right to review of his detention and could reasonably expect that an answer to his application for release would be given within a short time.

119. However, the District Court examined the application for release only at the following hearing on the merits, the date of which was fixed on the basis of the needs of the trial. More than three months elapsed between the date on which the application was introduced and the date on which it was examined by the court. The Government's argument that there was no need to hold a hearing before the findings of the expert examination had been received does not convince the Court. That consideration was perhaps relevant for scheduling the next hearing on the merits, but not for the review of the applicant's applications for release. The Government did not put forward any other plausible justification for the delay and there is no evidence that the applicant was in some way responsible for it.

120. The Court concludes that the review of the application for release lodged on 21 April 1999 was unduly delayed, and that, accordingly, there was a violation of Article 5 § 4 in this respect.

(b) As to the delay in the examination of the application for release of 17 September 1999

121. As regards the second application for release, the Court notes that on 27 July 1999 the Butyrskiy District Court ruled that the applicant was to remain in detention. That ruling, again, was not reasoned and did not specify the duration of detention. On 17 September 1999, one month and 21 days after the ruling, the applicant's representative lodged an application for release with the District Court. It was examined one month and 24 days later. In view of the considerations discussed above in paragraphs 117 et seq., the Court concludes that the review of the second application for release was also unduly delayed. Accordingly, there was a violation of Article 5 § 4 on that account.

(c) As to the access to the court of appeal

122. The applicant finally claimed that the appeal against the court decision of 27 July 1999, authorising his continuing detention, had never been examined by the second-instance court.

123. The Court takes note of the Government's argument that the appeal lodged by the applicant's lawyer on 30 July 1999 contained no request to review the ruling of the first-instance court concerning the detention on remand. However, the documents in the Court's possession attest to the contrary. It is true that the appeal (*частная жалоба*) of 30 July 1999 dealt mainly with the issues of the applicant's mental health. However, it also concerned the applicant's detention: the points of appeal expressly petitioned for a review of the trial court's decision to maintain the applicant in custody (see paragraph 17 above).

124. The Court recalls that where the domestic law provides for a system of appeal, the appellate body must also comply with Article 5 § 4 (see *Toth v. Austria*, judgment of 12 December 1991, Series A no. 224,

§ 84). Therefore, the failure to examine the appeal against the ruling of 27 July 1999 constituted a violation of the applicant's right to review of the lawfulness of his detention, guaranteed by Article 5 § 4.

V. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

125. The applicant complained about the unfairness of the criminal proceedings against him. In particular, he alleged that he had been incited by the police officers, acting through Ms T. as their agent, to commit the offences of procurement and supply of drugs. He invoked in that respect Article 6 of the Convention, which, insofar as relevant, provides:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time.
>
> ...
>
> 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 ..."

A. The parties' submissions

126. The Government argued that the applicant's rights had not been violated. They indicated that a "test buy", or, in the domestic terms, an "operative experiment" (*оперативный эксперимент*) was an appropriate method of fighting crime; the evidence obtained in such "experiments" was admissible under Russian law and could lead to conviction of the offender. They also stated that "the question as to what particular information concerning [the applicant's] illegal actions with narcotic drugs had been at the disposal [of the police before conducting the test buy] was not an element of evidence in the present criminal case". The test buy was carried out on a lawful basis and the evidence obtained thereby was duly included in the materials of the case file. Witness T. knew that the applicant was involved in drug trafficking. She agreed to participate in the test buy and did not put pressure on the applicant to obtain drugs from him.

127. The applicant maintained his complaints. Referring to the court decision of 11 November 1999, he argued that his conviction had been based solely on the evidence obtained through the "test buy". He indicated that domestic law permitted [the police] to conduct "experiments" only with a view to confirming an already existing suspicion against a person involved in criminal activities. However, the police operation in question was planned and carried out without the police having any incriminating

information about the applicant; on the contrary, he had had no criminal record and no preliminary investigation had been opened. The applicant contended that his case was factually similar to the *Teixeira de Castro* case (judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV) where the Court found a violation of Article 6 § 1 of the Convention.

B. The Court's assessment

1. General principles

128. At the outset, the Court would like to stress that it is not blind to the difficulties encountered by the authorities in combating serious crimes and the need for more sophisticated methods of investigation sometimes required in this context. In principle, the Court's case-law does not preclude reliance, at the investigation stage of criminal proceedings and where the nature of the offence so warrants, on evidence obtained as a result of an undercover police operation (see, for instance, *Lüdi v. Switzerland,* judgment of 15 June 1992, Series A no. 238). However, the use of undercover agents must be restricted; the police may act undercover but not incite (see *Teixeira de Castro*, cited above, § 36).

129. The Court notes that the applicant was arrested and then convicted as a result of a police operation. The Court has previously considered the use in criminal proceedings of evidence gained through entrapment by State agents. Thus, in the case of *Teixeira de Castro,* cited above, the applicant was offered money by undercover police officers to supply them with heroin. Although having no previous criminal record, he had contacts for obtaining drugs. Tempted by the money, the applicant accepted the officers' request. He was subsequently charged and convicted of a drug offence. In finding a violation of Article 6 § 1, the Court distinguished the officers' actions in that case from those of ordinary undercover agents, who may conceal their identities in order to obtain information and evidence about a crime without actively inciting its author to commit it. The Court noted that "while the rise in organised crime undoubtedly requires that appropriate measures be taken, the right to a fair administration of justice nevertheless holds such a prominent place [...] that it cannot be sacrificed for the sake of expedience" (§ 36). The Court stressed a number of features in that case, in particular the fact that the intervention of the two officers had not been part of a judicially supervised operation and that the national authorities had had no good reason to suspect the applicant of prior involvement in drug trafficking: he had no criminal record and there was nothing to suggest that he had a predisposition to become involved in drug dealing until he was approached by the police (ibid., §§ 37-38).

130. Similarly, in the recent case of *Vanyan v. Russia* (no. 53203/99, 15 December 2005, §§ 45-50), the Court found a violation of Article 6 § 1

arising from a simulated drug purchase which amounted to incitement and, whilst the purchase was carried out by a private person acting as an undercover agent, it had nevertheless been effectively organised and supervised by the police.

131. Further, in establishing compliance with the "fair trial" guarantee in cases where the evidence collected by this method had not been disclosed by the prosecution, the Court concentrated on the question of whether the defendant had been afforded adequate procedural safeguards (see *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, 27 October 2004, §§ 46-48).

2. Application of these principles in the present case

132. In their observations the Government expressed the view that the question of the applicant's previous involvement in drug trafficking was irrelevant for the purposes of the criminal proceedings leading to his conviction. The fact that the police operation was documented in the prescribed way made it lawful, and, consequently, the ensuing proceedings were fair.

133. The Court cannot, however, accept this argument. Domestic law should not tolerate the use of evidence obtained as a result of incitement by State agents. If it does, domestic law does not in this respect comply with the "fair-trial" principle, as interpreted in the *Teixeira* and follow-up cases. At the trial the defence asserted that the offence would not have been committed had it not been for the "provocation" by the police. In other words, the applicant put forward an "entrapment defence" which required appropriate review by the trial court, especially as the case contained certain *prima facie* evidence of entrapment.

134. Second, the Court notes that the applicant had no criminal record prior to his arrest in 1998. The information that the applicant had been previously implicated in drug dealing came from one source, namely T., the police informer. However, it is unclear why T. decided to cooperate with the police. Furthermore, she stated at the trial that she had contacted the applicant because at that time she had not known where else she could obtain heroin. The applicant had not derived any financial gain from buying the heroin from G. and giving it to T. M. testified that he had never bought heroin from the applicant before. Those elements could have been reasonably interpreted as suggesting that the applicant was not a drug dealer known to the police. Quite the opposite, it would appear that the police operation targeted not the applicant personally, but any person who would agree to procure heroin for T.

135. Third, the Court recalls that a clear and foreseeable procedure for authorising investigative measures, as well as their proper supervision, should be put into place in order to ensure the authorities' good faith and compliance with the proper law-enforcement objectives (see *Lüdi v.*

Switzerland, judgment of 15 June 1992, Series A no. 238; also see, *mutatis mutandis*, *Klass and Others v. Germany,* judgment of 6 September 1978, §§ 52-56, Series A no. 28). In the present case the police operation had been authorised by a simple administrative decision of the body which later carried out the operation. It transpires from the materials of the case that the text of that decision contained very little information as to the reasons for and purposes of the planned "test buy". Furthermore, the operation was not subjected to judicial review or any other independent supervision. In the absence of a comprehensive system of checks accompanying the operation (see paragraph 60 above), the role of the subsequent supervision by the trial court became crucial.

136. The Court notes that the only three witnesses questioned by the trial court were T., M. (the applicant's friend who was present at the moment of the arrest) and the applicant's mother. The policemen involved in the "test buy" have never been questioned by the court, although the defence sought to have them heard. Nor was G., who had sold the heroin to the applicant and had been convicted of that act, questioned in those proceedings. Finally, the Court is particularly struck by the fact that the applicant himself was not heard by the court on the subject of incitement: the applicant was absent from the hearing of 11 November 1999 at which the court examined the events of 29 October 1998.

137. In sum, although in the present case the domestic court had reason to suspect that there was an entrapment, it did not analyse the relevant factual and legal elements which would have helped it to distinguish entrapment from a legitimate form of investigative activity. It follows that the proceedings which led to the applicant's conviction were not "fair". Accordingly, there has been a violation of Article 6 § 1 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

138. 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

139. The applicant claimed 1,300 euros (EUR) as compensation for the cost of his medical treatment and EUR 15,000 as compensation for non-pecuniary damage. In support of his claim for pecuniary damages he provided a calculation of his annual expenditure on medicines.

140. The Government argued that the applicant should not receive any amounts under Article 41, since his allegations of ill-treatment were unfounded. In any event, this claim was excessive and was not amplified. Alternatively, they insisted that a finding of a violation would be sufficient satisfaction. As regards the pecuniary damages claimed by the applicant, the Government alleged that the applicant had not substantiated that the worsening of his health condition was imputable to the authorities.

141. As to the pecuniary damage allegedly caused, the Court reiterates that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention (see *Barberà, Messegué and Jabardo v. Spain,* judgment of 13 June 1994 *(former Article 50*), Series A no. 285-C, §§ 16-20; see also *Berktay v. Turkey*, no. 22493/93, § 215, 1 March 2001).

142. The Court has found that the applicant was subjected to inhuman treatment because of inadequate medical assistance in the detention facility. His health has deteriorated, which has caused him physical and mental suffering (see paragraph 83 above). However, this finding concerns only the period of his detention, and not the possible consequences ensuing from inadequate treatment of his illnesses. The applicant contended that he required constant medical treatment after his release, yet it is unclear to what extent the expenses he claimed in that respect were related to the effects of the lack of medical assistance in the detention facility and not to his chronic diseases, for which the authorities could not be held responsible. In these circumstances the Court accepts the Government's argument that the applicant's claims under this head are not sufficiently substantiated and rejects them.

143. As regards non-pecuniary damage, the Court recalls that it found that the applicant's rights guaranteed by Articles 3, 5 and 6 of the Convention had been violated. In particular, it found that while in detention the applicant had not received adequate medical treatment. That fact indisputably caused him certain physical and mental sufferings over a long period of time (over a year). Further the applicant was detained in custody without any proper justification, and the review of his applications for release took too long. These factors also caused him distress and a feeling of insecurity. Finally, the applicant was prosecuted, detained and then convicted on the basis of evidence obtained as a result of entrapment. He had to interrupt his studies and endure the other negative consequences of criminal prosecution, both physical and psychological. This was aggravated by the applicant's serious health problems, in particular his mental illness, and his relative immaturity at the time of the events. At the same time, the Court observes that, although the domestic court found the applicant guilty, it discharged him from criminal liability and ordered a very mild measure (compulsory medical treatment).

144. Consequently, ruling on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 12,000 (twelve thousand euros) under this head, plus any tax that may be chargeable.

B. Costs and expenses

145. The applicant claimed EUR 3,000 as costs and expenses. In support he produced an agreement with Ms Kostromina on the representation of his interests before the European Court of Human Rights.

146. The Government argued that the agreement with the Ms Kostromina was signed by the applicant's father and not the applicant himself. Furthermore, it stipulated that Ms Kostromina was representing the interests of "V.V. Khudobin", which are also the initials of the applicant's father. It contained no reference to the case-number, so the Government assumed that that agreement had no relation to the present case.

147. The Court recalls that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, for example, *Stašaitis v. Lithuania*, no. 47679/99, §§ 102-103, 21 March 2002).

148. The Court takes note of the Government's argument that the agreement between the applicant's father and Ms Kostromina did not relate to the present case. However, as follows from the text of that agreement, it concerned the proceedings before the European Court of Human Rights. In the list of cases pending before the Court there is no case lodged by the applicant's father. Furthermore, as was established above, Ms Kostromina was the applicant's representative before the domestic courts and in the Strasbourg proceedings (see paragraphs 72 et seq. above). Therefore, the Court concludes that the agreement with Ms Kostromina concerned the present case.

149. Furthermore, everything suggests that the applicant's father acted in the applicant's best interests and with his tacit approval. In Russian law such a situation is regarded as an agency agreement (see paragraph 71 above) and, under Article 984 of the Civil Code, it may create a legal obligation for the applicant to compensate the amounts paid by his father to Ms Kostromina. The Court concludes that the amount due to Ms Kostromina under the agreement may be regarded as the applicant's legal costs.

150. The Court notes that under the agreement the amount due to Ms Kostromina was 105,000 Russian roubles (about EUR 3,050). Given the complexity of the case, this sum does not seem excessive to the Court. The Court therefore awards the applicant 105,000 Russian roubles (RUR), plus any tax that may be chargeable.

C. Default interest

151. 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. *Dismisses* the Government's preliminary objection;

2. *Holds* that there has been a violation of Article 3 of the Convention in respect of inadequate medical treatment of the applicant in the detention facility;

3. *Holds* that it is not necessary to examine separately the other complaints submitted by the applicant under Article 3 of the Convention;

4. *Holds* that there has been a violation of Article 5 § 3 of the Convention;

5. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

6. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

7. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 12,000 (twelve thousand euros) in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of payment;

(ii) RUR 105,000 (one hundred and five thousand Russian roubles) in respect of legal costs and expenses;

(iii) 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;

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

Done in English, and notified in writing on 26 October 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President