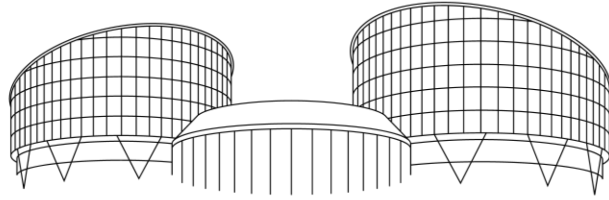

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

# CASE OF KORYAK v. RUSSIA

*(Application no. 24677/10)*

JUDGMENT

STRASBOURG

13 November 2012

**FINAL**

13/02/2013

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

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

**In the case of Koryak v. Russia,**

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

Nina Vajić, *President,*
Anatoly Kovler,
Peer Lorenzen,
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque, *judges,*
and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 23 October 2012,

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

# PROCEDURE

1. The case originated in an application (no. 24677/10) 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 Igor Vyacheslavovich Koryak ("the applicant"), on 17 February 2010. Following the applicant's death on 29 December 2011, his mother, Mrs Yevdokiya Iosifovna Koryak, informed the Court of her wish to pursue the application originally introduced by her son.

2. The applicant, and later Mrs Koryak, were represented by Mr S. Kiryukhin, a lawyer practising in Orsk. The Russian Government ("the Government") were represented by Mr G. Matyushkin, 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 attention while in detention and that, following a refusal to release him on parole despite his extremely poor health, his subsequent detention had amounted to inhuman treatment.

4. On 18 March 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1). Further to the applicant's request, the Court granted priority to the application (Rule 41 of the Rules of Court).

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1961 and lived before his arrest in the city of Orsk, Orenburg Region. At the time of application he was serving a sentence in correctional colony no. 5 in the village of Maksay in the Orenburg Region.

### A. Criminal proceedings against the applicant

6. On 20 April 2004 the Oktyabrskiy District Court of Orsk found the applicant guilty of murder committed in a drunken rage and sentenced him to ten years' imprisonment. The judgment was upheld on appeal by the Orenburg Regional Court and became final. The applicant's sentence was to come to an end on 25 November 2013.

### B. Applicant's state of health

7. The Government provided the Court with a copy of the applicant's medical records, written by hand and recording his condition from the first days of his detention. They also submitted a typed version of the same records to facilitate the Court's task of deciphering the doctors' handwriting. At the same time, given very serious discrepancies between the two versions, with vast pieces of the handwritten version missing from its typed copy and a selective approach in copying the specific wording from the handwritten version to the typed one, the Court will only base its findings on the handwritten version of the applicant's medical records.

8. As is evident from the records, the applicant had suffered from tuberculosis since 1981. The treatment that he had received in a civil hospital was successful, leading to his clinical recovery from the illness. According to the Government, in 1997 the applicant became an injecting heroin user.

9. Upon his detention in temporary detention facility no. IZ-56/2 in the Orenburg Region following his arrest on 26 November 2003, the applicant was placed on a register of inmates in need of close supervision in relation to his chronic illnesses and, given his history with drugs, his blood was taken for testing for the presence of infections, including HIV. On the basis of the test results, which were received in January 2004, the applicant was diagnosed with HIV. When informing the applicant that he had contracted HIV, the prison doctor served him with a memo explaining the results of the test and describing various aspects of the infection, its assessment,

treatment, ways of transmission and precautions to be taken in everyday life to avoid the spread of the infection. The applicant's medical records show that the doctors concluded that the applicant was suffering from clinical stage 2 HIV infection.

10. In December 2003 the applicant complained to a prison tuberculosis specialist of fatigue, pain in the epigastrium, a high temperature and loss of weight. The specialist observed the applicant, having noted his "satisfactory state" and bubbling crackles and wheezing in his right lung. The diagnosis was clinical recovery from pulmonary tuberculosis. No treatment or medical procedures were prescribed.

11. During a subsequent examination by the tuberculosis specialist on 9 February 2004 the applicant again complained of fatigue and excessive sweating. The specialist concluded that the applicant had significant residual changes after pulmonary tuberculosis and prescribed him an antibacterial drug to treat an active form of tuberculosis and a special food regimen. On the following day the applicant was seen by an infectious diseases specialist, who confirmed the diagnosis of stage 2 HIV infection. The specialist noted the need to closely supervise the applicant in his medical records.

12. Following the examinations on 9 and 10 February 2004, the applicant was not seen either by tuberculosis or HIV specialists in the temporary detention facility. On admission to correctional colony no. 5 in July 2004 the applicant was included on the list of detainees in need of close medical supervision. Between July 2004 and June 2005 the medical assistance provided to the applicant concentrated on dealing with his drug withdrawal symptoms and a leg injury. On 21 June 2005 a colony doctor noted the applicant's history of suffering from tuberculosis and stage 2B HIV infection in his medical records and observed that the applicant had not reported any health complaints pertaining to the two illnesses. A medical observation of the applicant in August 2005, in response to his complaints of fatigue, did not reveal any problems with his lungs. A month later the applicant was examined by a tuberculosis specialist, to whom he complained of general exhaustion, heavy breathing and a short dry cough. Having diagnosed the applicant with chronic bronchitis in remission, the specialist prescribed the applicant treatment and scheduled a chest radiography exam. The results of the exam performed on 26 September 2005 were compared to those of the applicant's previous radiography tests in November 2004 and April 2003, with no acute pulmonary disease being detected. On the day after the radiography exam, the applicant again repeated his health complaints to the tuberculosis specialist. Having noted no changes in the applicant's state of health, the specialist authorised his transfer to another colony.

13. Between 6 October and 9 November 2005 the applicant was again detained in a temporary detention facility in Orenburg, as a temporary measure preceding his transfer to the new correctional colony. The applicant

complained to the facility's doctor of coughing up phlegm and blood and heavy breathing during even slight physical exercise. The doctor noted rough respiration and dry wheezing noises in the applicant's left lung and ordered a chest X-ray. The order was not followed through.

14. On 11 November 2005 the applicant arrived at correctional colony no. 5, where he stayed for twelve days until his transfer to a temporary detention facility in Orsk.

15. Two days after the applicant's admission to the Orsk detention facility he was seen by an infectious diseases specialist. Having noted the applicant's weight loss and his large number of complaints accompanied by demands to initiate treatment, the specialist concluded that the complaints were unfounded, as the applicant did not know what illness he had that required treatment. The record drawn up at that time indicated that the applicant's HIV infection was now at stage 3. On 13 December 2005 he was sent to prison no. 1 in the Chelyabinsk Region.

16. Following the applicant's admission to the prison, a prison doctor paid him a visit. After a short examination, the doctor was satisfied with the applicant's state of health, and in particular the absence of any wheezing noises during breathing. Another medical examination was performed on 26 February 2006 by a prison medical assistant during the applicant's detention in the prison punishment ward. As the assistant recorded in the medical records, the applicant complained about the conditions of his detention in the ward and demanded "particular attention" and "expensive treatment" against the HIV infection, as well as to be seen by an infectious disease specialist and not by a medical assistant. The assistant further noted that a visual examination of the applicant had not led to the discovery of any clinical manifestation of the HIV infection and that the prison did not employ an infectious diseases specialist. At the same time, the assistant reiterated that a tuberculosis specialist, a surgeon, a prison medical assistant and the head of the medical unit had already examined the applicant. A chest X-ray exam performed on 21 March 2006 showed large calcined foci in the upper lung lobes on both sides.

17. Between 1 March and 12 May 2006 the applicant was examined by prison doctors or medical assistants on a number of occasions, each time either prior to his placement in or during his detention in the prison punishment ward. Each time his latent stage HIV was noted in his medical records. No negative changes pertaining to his history of tuberculosis were recorded. On 3 April 2006 the applicant was seen by a psychiatrist, on whose recommendation he underwent treatment in a psychiatric hospital between 15 May and 11 June 2006. On the day following the applicant's admission to the psychiatric hospital he was subjected to a chest X-ray exam which discovered pulmonary fibrosis and dense nidi in the upper lobes of the lungs. The applicant's subsequent medical examinations after his return from the hospital were devoted to solving his psychological problems and

treating skin illnesses. The doctors continued recording his history of tuberculosis and his infection with HIV, observing no negative changes pertaining to the two infections and not scheduling any medical procedures linked to the two illnesses.

18. On 24 February 2007 the applicant was transferred to colony no. 5. He was immediately examined by an infectious diseases specialist who, having recorded the applicant's weight loss and his suffering from herpes on the chest since December 2006, confirmed the progression of the HIV infection to stage 4B with associated secondary illnesses. During a subsequent examination by the same specialist the applicant complained of asthenia, a high temperature and a cough. A diagnosis of an acute respiratory viral infection led to the prescription of a cough medicine, vitamins and paracetamol. On a number of occasions the applicant had consultations with a surgeon, a psychiatrist and the head of the colony medical unit in respect of his psychological problems and an old leg injury. Once every two months he was seen by an infectious diseases specialist who, having recorded the progress of the HIV infection each time, prescribed multivitamins for the applicant. The Court observes that the progress of the illness was recorded in the handwritten version of the medical records, while the typed version does not contain that entry.

19. In July 2007, as is stated in the copy of the handwritten version of the medical records, the applicant was detained together with an inmate suffering from an active form of tuberculosis. As a result of a medical examination on 27 July 2007 it was decided to place the applicant under close anti-tuberculosis supervision, to start treating him with tubazid, an anti-tuberculosis medicine based on isoniazid, and to test his phlegm for the presence of bacteria. There is no indication that the applicant was provided with the medicine. The test was only performed in October 2007 following the applicant making another series of health complaints.

20. Following the applicant again coming into contact with an inmate suffering from an active form of tuberculosis, as once again was recorded in the handwritten version of the applicant's medical records, and given his continuing health complaints, on 15 November 2007 the prison doctor repeated her decision to closely observe the applicant, to treat him with an anti-bacterial medicine and to perform microbiological tests on his phlegm. Again, no indication was given in the medical records whether the instructions were complied with.

21. The applicant was not subjected to any medical examinations or procedures between 15 November 2007 and 2 April 2008, when he was consulted by a psychiatrist. A subsequent examination by a prison doctor on 8 May 2008 was carried out in respect of the applicant's complaints of fatigue, a sore throat and a high temperature. The diagnosis was an acute viral infection, for which treatment was prescribed. However, the doctor scheduled a chest X-ray, which was performed on 19 May 2008 and

revealed dense nidi and infiltration in the applicant's lungs. The final diagnosis was infiltrative tuberculosis of the left lung. The applicant was transferred to the correctional colony's tuberculosis hospital.

22. On 6 June 2008 an infectious diseases specialist examined the applicant, for the first time following the discovery of the reactivation of the tuberculosis infection. Having recorded a long list of the applicant's health complaints, he noted the following diagnosis in the medical records: stage 4B HIV infection, progressing as a result of the absence of antiretroviral therapy, and infiltrative tuberculosis of the upper lobe of the left lung. Biochemical and viral blood tests were scheduled. On the following day the applicant started receiving treatment with four antibacterial medicines. His medical records contain a note of his full compliance with the medical recommendations. As a result of a subsequent examination by the specialist on 24 June 2008, the applicant was prescribed a specific food regimen. The specialist also noted that the applicant was taking hepatoprotective medicines. Another examination carried out more than a month later did not lead to any additional recommendations or prescriptions being made.

23. Given the applicant's strict compliance with the intensive chemotherapy regimen for his anti-tuberculosis treatment, on 20 August 2008 the doctors noted positive signs, with an X-ray exam revealing disintegration of the tuberculosis infiltration. The applicant was to continue the intensive phase of the treatment. According to the Government, on two occasions, in June and August 2008, the applicant was offered antiretroviral therapy, which he refused without any explanation. At the same time, the medical records show that the applicant continuously complained of nausea, fatigue and a generally poor condition during the intensive stage of his anti-tuberculosis treatment.

24. In October 2008, following the completion of the intensive phase of the treatment, the applicant underwent bacteriological tests which showed that he was no longer smear positive. The continuation phase of the therapy commenced. Between October 2008 and February 2009 the applicant was examined at least once every two weeks. His complaints were recorded and addressed, various tests were performed and his treatment was adjusted to take account of the test results. The applicant's condition was considered to be satisfactory.

25. A bacteriological test on 6 February 2009 showed negative changes in the applicant's condition and led to a recommendation that the applicant be seen by an infectious diseases specialist. The specialist's recommendation was that he immediately commence antiretroviral therapy. On 12 February 2009 the applicant started taking combivir and stocrin.

26. The applicant continued complaining of poor health, with the prison doctors noting each time that his condition was satisfactory. Only after an X-ray exam and a series of bacteriological tests in April 2009 showed the

progress of the applicant's tuberculosis was his treatment changed and he was again assigned the intensive chemotherapy regimen.

27. In May 2009, with the exams revealing a drastic progression of the applicant's tuberculosis, the doctors noted the ineffectiveness of the applicant's treatment but decided to continue with it. At the same time, they scheduled the applicant for a forensic medical examination. The applicant's medical check-ups became a daily matter. With his condition continuing to deteriorate the doctors introduced painkillers to his chemotherapy regimen. In July 2009 the chemotherapy regimen was once again changed with a number of additional medicines being introduced. The applicant was sent for a chest radiography examination, clinical blood analyses and sputum culture testing. The tests revealed various intensive foci in the applicant's left lung within the zone of destruction and showed that the applicant was smear positive.

28. The final diagnosis recorded in the applicant's medical records in July 2009 was as follows: "an illness caused by the human immunodeficiency virus (HIV) at stage 4B [with associated] secondary illnesses in the form of a systematic infection (AIDS) while antiretroviral therapy [is being] provided. Candidiasis of the oral cavity. Cachexia of the first degree. Infiltrative tuberculosis of the upper lobe of the left lung in the disintegration phase. [Presence] of the mycobacterium tuberculosis (+). Low degree anaemia." The doctors decided to prepare documents to seek the applicant's early release given his very serious condition.

29. Between July and September 2009 the applicant was examined once a week, with the exams revealing no positive changes. Tests showed that the applicant had started developing resistance to at least three major anti-tuberculosis drugs. Given the absence of any reserve anti-bacterial drugs in the hospital, it was recommended that he continue with the initial treatment despite the negative treatment response. According to the Government, the applicant was offered a transfer "to a specialised medical facility" but he declined the offer. At the same time, the medical records contain a number of entries showing the applicant's full compliance with the treatment.

30. In the beginning of November 2009 the applicant was transferred to temporary detention facility no. IZ-56/2, where he stayed until his return to the tuberculosis hospital in correctional colony no. 5 on 1 December 2009. The anti-tuberculosis treatment was maintained during the applicant's time in the temporary detention facility on the colony doctors' recommendation. The following entry was made in his medical records upon admission to the temporary detention facility: stage 4B HIV infection, progressing as a result of the absence of antiretroviral therapy. The Government provided the Court with a handwritten certificate issued in the temporary detention facility. The certificate listed two antiretroviral drugs among the medicines administered to the applicant during his detention in that facility. One of the antiretroviral

medicines (kaletra) mentioned in the certificate was introduced to the applicant's chemotherapy regimen later in the course of treatment, when his illness had progressed to a new stage (see paragraph 35 below).

31. After the applicant's return to the tuberculosis hospital, the doctors continued with the same regimen of medical check-ups and chemotherapy with no positive changes in his state being recorded. The doctors' actions included regular blood and sputum smear tests, general medical examinations and recommendations to continue the intensive phase of the anti-tuberculosis and antiretroviral therapy.

32. In January 2010, having noted the applicant's suffering from clinical stage 4 HIV (AIDS) with the progressive deterioration of his condition despite the antiretroviral therapy, the doctors noted in his medical records that any request for his early release had to be lodged before a local court. On 29 January 2010 a medical panel comprising a number of specialists examined the applicant and prepared a report, having observed that his condition was extremely serious despite the intensive medical treatment. They also noted that the applicant had fully complied with the doctors' recommendations and had regularly followed the treatment. The commission concluded that the applicant's HIV infection had progressed to stage 4C under the medical classification scheme and that his suffering from an active form of tuberculosis was burdened by his having developed multiple drug-resistances. The commission's report served as the basis for the petition for the applicant's release. A subsequent entry in the applicant's medical records made in March 2010 recorded the court's refusal to authorise the release.

33. The doctors went on with the same regimen of examinations and chemotherapy in respect of the applicant's tuberculosis and AIDS. Their offer to transfer the applicant to another "specialised" tuberculosis hospital was allegedly again declined by him.

34. In August 2010 the prison medical staff made another attempt at obtaining the applicant's early release on health grounds. Their motion was dismissed by a court on 26 August 2010.

35. Following a further serious deterioration of the applicant's health, with his HIV infection having progressed and the applicant having been diagnosed with tuberculoma, in September 2010 his doctors changed his treatment. They prescribed new antiretroviral drugs, having replaced stocrin with kaletra. In the end of November 2010 the applicant started receiving reserve anti-tuberculosis drugs under an extremely intensive chemotherapy regimen, with the drugs being administered through injections (amongst other methods).

36. In their memorandum lodged on 22 July 2011 the Government submitted that the changes to the chemotherapy regimen and the regular medical supervision, including frequent medical check-ups and clinical testing since November 2010, had led to the applicant's condition having

stabilised. While no positive signs in terms of the applicant's state of health had been recorded, his condition was considered satisfactory. The Government further observed that on 12 May 2011 a medical panel from the tuberculosis prison hospital had examined the applicant and had concluded that his condition no longer warranted a request for his release on parole.

## C. Requests for release on parole

### *1. Request in 2009*

37. Given the rapid deterioration of his health and fearing for his life, the applicant applied to the Novotroitsk Town Court, seeking his release on parole. In particular, the applicant argued that his illnesses made his further detention inhuman, causing him immense suffering and, therefore, warranting his early release.

38. The colony administration objected to the applicant's early release, arguing that he had frequently violated the established rules of detention in the colony and had persistently refused to work. On 7 April 2005, by a decision of the colony governor, he was declared to be a persistent offender and ordered to serve the remainder of his sentence in the strictest conditions. In September 2005, by a decision of the Novotroitsk Town Court, he was transferred to a prison for a year. The applicant, however, continued to refuse to take part in educational activities and did not show willingness to reform.

39. On 25 September 2009 the Novotroitsk Town Court dismissed the applicant's request, having found as follows:

> "Having examined the applicant's arguments, having studied the materials in the case file, having heard a representative of colony no. 5... and a prosecutor who petitioned for the dismissal of [the applicant's] request for release on parole on medical grounds, having reviewed the materials of [the applicant's] prison record, having heard a doctor from colony no. 5 who [stated] that [the applicant] suffers from an illness which is included on the list of illnesses serving as a ground for release on parole, [and having considered] that [the applicant has] violated the detention rules on ninety-six occasions and that [those violations] did not expire or were not lifted, the court finds that [the applicant's] request should be dismissed on the following grounds: [the applicant] suffers from an illness which is included in the list of illnesses serving as a ground for early release on medical grounds, but the court takes into account that during his detention [the applicant has] committed ninety-six violations of the detention rules which were not lifted and which did not expire. By a decision of 7 April 2005 of the colony governor [the applicant] was declared a persistent offender... By a decision of 12 July 2005 of the head of the wing [the applicant] was ordered to serve the remainder of his sentence in the strictest conditions of detention. By a decision of the Novotroitsk Town Court of 5 September 2005 he was transferred to a prison for a year. He does not take part in educational activities in his wing; [he] does not make any positive contributions; and [he] is characterised in a negative way. The remaining period of the sentence still to be

served by [the applicant] amounts to more than four years. The court therefore considers that [the applicant] cannot be released on parole.”

40. On 24 November 2009 the Orenburg Regional Court upheld the judgment on appeal, having entirely endorsed the Town Court’s reasoning. The Regional Court also concluded that the applicant was detained in a penal facility which was well-equipped to provide him with the necessary medical assistance.

*2. Request in March 2010*

41. In March 2010 the applicant, joined by the medical panel of the colony hospital, filed another request for his early release, arguing that his condition was extremely serious and had continued to deteriorate. Having examined the applicant’s behaviour while serving his sentence, on 17 March 2010 the Novotroitsk Town Court dismissed the request. It once again concluded that there was no evidence that he had reformed. At the same time, the Town Court took into account the quality of the medical assistance afforded to the applicant in the penal facility, having held, in particular, as follows:

“The serious form of [the applicant’s] illness has been discovered while serving his sentence; the cause of his illness was his having used drugs through contaminated syringes since 1997. Immediately after his illness was discovered, treatment was initiated in conjunction with [the applicant’s] isolation from society. The medical assistance provided to [the applicant] corresponds to the level of medical assistance provided in the Russian Federation and has been fully provided to him. Inmates detained in the [facility’s] hospital are provided with a proper, balanced food regimen, which [the applicant] does not dispute. The deterioration of [the applicant’s] health at the present time has been caused by the need to treat him with reserve medicines, which is only possible in another specialised medical facility which is situated in another penal facility. Until the present court hearing [the applicant] has not agreed to his transfer to that facility. [The applicant] is infectious and, given his state of health, presents a danger to those around him. Therefore, his treatment at home is impossible, as he needs to be treated as an inpatient in a hospital.”

The Town Court also noted that, should the applicant’s state of health continue to deteriorate, he still had the opportunity to lodge another request for release.

42. The judgment became final on 13 April 2010 when the Orenburg Regional Court upheld it on appeal.

*3. Request in August 2010*

43. Another request for a release lodged by the applicant in August 2010 was dismissed by the Novotroitsk Town Court on 26 August 2010 with reasoning similar to that employed by the court in its two previous decisions on the same matter. The judgment was upheld on appeal on 7 October 2010.

### D. Applicant's death

44. On 11 April 2012 the Court received a letter from the applicant's lawyer informing it of the applicant's death on 29 December 2011 and expressing his mother's intention to pursue the application introduced by her son. A power of authority signed by the applicant's mother entitling the lawyer to represent her interests before the Court and death certificate no. 094938 dated 30 December 2011 were enclosed with the letter. The death certificate indicated that the applicant had not been married. It also indicated that he had died from an illness. Heart failure was indicated as the cause of death.

## II. RELEVANT DOMESTIC LAW

### A. Provisions governing the quality of medical care afforded to detainees

45. The relevant provisions of domestic and international law governing the health care of detainees, including those suffering from HIV and tuberculosis, are set out in the following judgments: *A.B. v. Russia*, no. 1439/06, §§ 77-84, 14 October 2010; *Yevgeniy Alekseyenko v. Russia*, no. 41833/04, §§ 60-66 and 73-80, 27 January 2011; and *Pakhomov v. Russia*, no. 44917/08, §§ 33-39 and 42-48, 30 September 2011.

### B. Provisions establishing legal avenues for complaints about the quality of medical assistance

#### *1. Prosecutors Act (Federal Law no. 2202-1 of 17 January 1992)*

46. The list of prosecutors' official powers includes the rights to enter premises, to receive and study materials and documents, to summon officials and private individuals for questioning, to examine and review complaints and petitions containing information on alleged violations of individual rights and freedoms, to explain the avenues of protection for those rights and freedoms, to review compliance with legal norms, to institute administrative proceedings against officials, to issue warnings about the unacceptability of violations and to issue reports pertaining to the remedying of violations uncovered (sections 22 and 27).

47. A prosecutor's report pertaining to the remedying of violations uncovered is served on an official or a body, which has to examine the report without delay. Within a month specific measures aimed at the

elimination of the violation(s) should be taken. The prosecutor should be informed of the measures taken (section 24).

48. Chapter 4 governs prosecutors' competence to review compliance with legal norms by the prison authorities. They are competent to verify that prisoners' placement in custody is lawful and that their rights and obligations are respected, as well as to oversee the conditions of their detention (section 32). To that end, prosecutors may visit detention facilities at any time, talk to detainees and study their prison records, require the prison administration to ensure respect for the rights of detainees, obtain statements from officials and institute administrative proceedings (section 33). Decisions and requests by a prosecutor must be unconditionally enforced by the prison authorities (section 34).

*2. Code of Civil Procedure: Complaints about unlawful decisions*

49. Chapter 25 sets out the procedure for the judicial review of complaints about decisions, acts or omissions of the State and municipal authorities and officials. Pursuant to Ruling no. 2 of 10 February 2009 by the Plenary Supreme Court of the Russian Federation, complaints by suspects, defendants and convicts of inappropriate conditions of detention must be examined in accordance with the provisions of Chapter 25 (point 7).

50. A citizen may lodge a complaint about an act or decision by any State authority which he believes has breached his rights or freedoms, either with a court of general jurisdiction or by sending it to the directly higher official or authority (Article 254). The complaint may concern any decision, act or omission which has violated rights or freedoms, has impeded the exercise of rights or freedoms, or has imposed a duty or liability on the citizen (Article 255).

51. The complaint must be lodged within three months of the date on which the citizen learnt of the breach of his rights. The time period may be extended for valid reasons (Article 256). The complaint must be examined within ten days; if necessary, in the absence of the respondent authority or official (Article 257).

52. The burden of proof as to the lawfulness of the contested decision, act or omission lies with the authority or official concerned. If necessary, the court may obtain evidence of its own initiative (point 20 of Ruling no. 2).

53. If the court finds the complaint justified, it issues a decision requiring the authority or official to fully remedy the breach of the citizen's rights (Article 258 § 1). The court determines the time-limit for remedying the violation with regard to the nature of the complaint and the efforts that need to be deployed to remedy the violation in full (point 28 of Ruling no. 2).

54. The decision is dispatched to the head of the authority concerned, to the official concerned or to their superiors, within three days of its entry into force. The court and the complainant must be notified of the enforcement of the decision no later than one month after its receipt (Article 258 §§ 2 and 3).

### *3. Civil Code*

55. Damage caused to the person or property of a citizen shall be compensated in full by the tortfeasor. The tortfeasor is not liable for damage if he proves that the damage has been caused through no fault of his own (Article 1064 §§ 1, 2).

56. State and municipal bodies and officials shall be liable for damage caused to a citizen by their unlawful actions or omissions (Article 1069). Irrespective of any fault by State officials, the State or regional treasury are liable for damage sustained by a citizen on account of: (i) unlawful criminal conviction or prosecution; (ii) unlawful application of a preventive measure; and (iii) unlawful administrative punishment (Article 1070).

57. Compensation for non-pecuniary damage is effected in accordance with Article 151 of the Civil Code and is unrelated to any award in respect of pecuniary damage (Article 1099). Irrespective of the tortfeasor's fault, non-pecuniary damage shall be compensated if the damage was caused: (i) by a hazardous device; (ii) in the event of unlawful conviction or prosecution or unlawful application of a preventive measure or unlawful administrative punishment: or (iii) through dissemination of information which was damaging to the victim's honour, dignity or reputation (Article 1100).

# THE LAW

## I. PRELIMINARY CONSIDERATIONS: THE *LOCUS STANDI* OF THE APPLICANT'S MOTHER

58. The Court must first address the issue of Mrs Koryak's entitlement to pursue the application originally introduced by the applicant. It reiterates that on 11 April 2012 the applicant's lawyer submitted that the applicant had died on 29 December 2011 and that his mother (the applicant's heir) wished to take his place in the proceedings before the Court.

59. The Government submitted that the application should be struck out of the list of cases pursuant to Article 37 § 1 of the Convention, as the applicant's complaint of inadequate medical assistance was closely linked to the person of the applicant and did not seem to raise issues of general

interest. They insisted that a further examination of the applicant's claims would therefore be unreasonable.

60. The Court has previously taken into account similar requests (see, for example, *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII, and *Kovačić and Others v. Slovenia* [GC], nos. 44574/98, 45133/98 and 48316/99, §§ 189-192, 3 October 2008), having considered whether or not the persons wishing to pursue the proceedings were the applicant's close relatives (see *Thévenon v. France* (dec.), no. 2476/02, ECHR 2006-III, and *Scherer v. Switzerland*, 25 March 1994, §§ 31-32, Series A no. 287) and whether the rights concerned were transferable. It has continued the examination of cases involving pecuniary claims that were transferable to the deceased applicant's heirs (see, for example, *Ahmet Sadık v. Greece*, 15 November 1996, § 26, *Reports of Judgments and Decisions* 1996-V). On the other hand, the Court has applied a much more restrictive approach to other rights, having held that if a right was eminently personal, it was therefore of a non-transferable nature (see, with further references, *Vääri v. Estonia* (dec.), no. 8702/04, 8 July 2008, and *Angelov and Angelova v. Bulgaria* (dec.), no. 16510/06, 7 December 2010).

61. The Court has also considered whether the case concerned involved an important question of general interest transcending the person and the interests of the applicant (see *Karner v. Austria*, no. 40016/98, §§ 25-27, ECHR 2003-IX; *Marie-Louise Loyen and Bruneel v. France*, no. 55929/00, § 29, 5 July 2005; and *Biç and Others v. Turkey*, no. 55955/00, § 23, 2 February 2006).

62. Turning to the present case, the Court observes that Mrs Koryak wished to continue the application lodged by her son. Thus, the first condition of close kinship is met. However, the application mainly concerned issues falling under Article 3 of the Convention, which are closely linked to the person of the original applicant. In this respect, the Court reiterates its position that a next-of-kin or heir may continue with an application if he or she has legitimate or sufficient interest in the case. For instance, in the case of *Jėčius v. Lithuania* (no. 34578/97, § 41, ECHR 2000-IX) it stated as follows:

> "... where an applicant dies during the examination of a case concerning the unlawfulness of his detention, his heirs or next of kin may in principle pursue the application on his behalf (see, among other authorities, *Krempovskij v. Lithuania* (dec.), no. 37193/97, 20 April 1999, unreported). The Court considers, like the Commission, that the applicant's widow has a legitimate interest in pursuing the application in his stead."

63. The Court has been even more inclined to allow the next-of-kin to continue proceedings before it after the death of the direct victim in cases brought under Article 2 or 3 of the Convention, having stated that these Convention provisions protect the fundamental values of every democratic society and having taken into account the "particular situation governed by

the nature of the violation alleged...” (see, among other authorities, *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 200, ECHR 2009; see also *Khadzhialiyev and Others v. Russia*, no. 3013/04, § 114, 6 November 2008, as regards Article 3 claims).

64. The Court’s position in those cases is intertwined with the criterion “of general interest” (see paragraph 61 above). It once again reiterates that the existence of other persons to whom a claim could be transferred is an important criterion, but is not the only one for the Court to take into consideration when deciding whether to continue with the case. As the Court pointed out in *Malhous* (decision cited above), human rights cases before the Court generally also have a moral dimension, which must be taken into account when considering whether the examination of an application after the applicant’s death should be continued. This aspect of a case is all the more important, as in the present case, if the main issue raised by the case transcends the person and the interests of the applicant.

65. The Court has repeatedly stated that its “judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties” (see *Ireland v. the United Kingdom*, 18 January 1978, § 154, Series A no. 25, and *Guzzardi v. Italy*, 6 November 1980, § 86, Series A no. 39). Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States (see *Karner,* cited above, § 26).

66. The Court considers that the subject matter of the present application – the standard and quality of medical assistance for a seriously ill detainee, who had suffered from two diseases plaguing Russian detention facilities, HIV and tuberculosis, coupled with an issue of exhaustion of domestic remedies under Russian law – involves an important question of general interest, not only for Russia but also for other States Parties to the Convention. Thus, the continued examination of the present application would contribute to elucidating, safeguarding and developing the standards of protection under the Convention.

67. In these particular circumstances, the Court finds that respect for human rights as defined in the Convention and the Protocols thereto requires a continuation of the examination of the case and that the conditions for striking the case out from the list of pending cases, as defined in Article 37 § 1 of the Convention, are not met.

68. Accordingly, having noted that not only the condition of close kinship but also the requirement of general interest transcending the

applicant has been met in the present case, the Court finds it necessary to continue to examine the application in accordance with Mrs Koryak's request.

69. The Court would point out, however, that its recognition of Mrs Koryak's entitlement to pursue the application in no way affects the scope of the case as originally submitted by the applicant. It is not called upon to examine whether, after the applicant's death, there has been any interference with Mrs Koryak's own rights under the Convention. Its examination must be limited to the question of whether or not the complaints as originally submitted by the applicant, Mr Koryak, disclose a violation of the Convention.

## II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

70. The applicant complained under Article 3 of the Convention that the authorities had not taken steps to safeguard his health and well-being, having failed to provide him with adequate medical assistance, despite his suffering from HIV/AIDS and tuberculosis. He further argued that the authorities' persistent refusals to release him on medical grounds had exposed him to additional, continuous suffering amounting to torture. Article 3 of the Convention reads as follows:

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

### A. The parties' submissions

71. In their memorandum lodged on 22 July 2011 the Government put forward two lines of argument, insisting that the applicant had not exhausted domestic remedies available to him and, at the same time, arguing that the treatment provided to the applicant during the entire period of his detention had corresponded to the highest standards. As to the first argument, the Government stressed that the applicant had not complained to a court or any other State body of ineffective medical assistance. The procedure for making claims before a court was established in Chapter 25 of the Code of Civil Procedure, as clarified by the Supreme Court's Ruling no. 2 of 10 February 2009. Having relied on two cases examined by the Russian courts and the Court's findings in the case of *Popov and Vorobyev v. Russia* (no. 1606/02, 23 April 2009), they submitted that it had also been open to the applicant to lodge a tort action claiming compensation for damage caused by allegedly inadequate medical assistance. Relying on Resolution no. CM/ResDH(2010)35 adopted at the 1078th Meeting of the Committee of Ministers of the Council of Europe, the Government further noted that statistics and a number of cases presented to the Committee had

demonstrated the developing practice of the Russian courts in awarding compensation for non-pecuniary damage caused by unsatisfactory conditions of detention. In the Government's opinion, the applicant's failure to apply to a Russian court or any "other instance" with a complaint had to be interpreted by the Court as his unwillingness to comply with the admissibility requirements set out by Article 35 §§ 1 and 4 of the Convention.

72. In the alternative, the Government argued that the applicant had been provided with adequate care, irrespective of the type of detention facility in which he had been kept. He had been effectively treated both in the colony hospital and in ordinary detention facilities. The medical personnel had possessed the necessary training and skills to treat the applicant. The facilities had been equipped with medicines and medical equipment according to established norms. The Government pointed out that the applicant had been subjected to a number of medical examinations, tests and procedures. On at least two occasions he had been offered a transfer to another "specialised" medical facility which had been better equipped to deal with his condition, but the applicant had refused to accept the offer. The Government concluded by noting that the applicant's treatment had been so successful that, according to the most recent complex medical assessment performed in May 2011, his state of health no longer warranted his early release.

73. In his observations submitted to the Court on 25 September 2011 the applicant argued that his detention in the conditions of a correctional colony was inhuman, that his mother, and not the detention facility, had provided him with necessary medicines, and that his doctors had concealed the fact that he had no more than several months to live, particularly given his ineffective medical care.

## B. The Court's assessment

### *1. Admissibility*

#### (a) Exhaustion of domestic remedies

74. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring their case against the State before the Court to first use the remedies provided by the national legal system. Consequently, States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available

to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI, and *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24).

75. An applicant is normally required to have recourse only to those remedies that are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see, amongst others, *Vernillo v. France*, 20 February 1991, § 27, Series A no. 198, and *Johnston and Others v. Ireland*, 18 December 1986, § 22, Series A no. 112). 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, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government had in fact been used 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 the requirement.

76. The Court would emphasise that the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that the rule of domestic remedies must be applied with some degree of flexibility and without excessive formalism (see *Cardot v. France*, 19 March 1991, § 34, Series A no. 200). It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (see *Van Oosterwijck v. Belgium*, 6 November 1980, § 35, Series A no. 40). This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate, as well as the personal circumstances of the applicants (see *Akdivar and Others v. Turkey*, 16 September 1996, §§ 65-68, *Reports* 1996-IV).

77. Where the fundamental right to protection against torture, inhuman and degrading treatment is concerned, the preventive and compensatory remedies have to be complementary in order to be considered effective. The existence of a preventive remedy is indispensable for the effective protection of individuals against the kind of treatment prohibited by

Article 3 of the Convention. Indeed, the special importance attached by the Convention to that provision requires, in the Court's view, that the States Parties establish, over and above a compensatory remedy, an effective mechanism in order to put an end to any such treatment rapidly. Had it been otherwise, the prospect of future compensation would have legitimised particularly severe suffering in breach of this core provision of the Convention (see *Vladimir Romanov v. Russia*, no. 41461/02, § 78, 24 July 2008).

78. The Court observes that the Government listed a complaint under Chapter 25 of the Code of Civil Procedure, a tort action or a complaint to "any other State body" as the remedial avenues which the applicant had allegedly failed to use. They did not specify a reasonably comprehensive and consolidated body of applicable rules, recommended practices and guidelines for the Court to clearly understand to which State authorities, apart from a court, the applicant should have resorted. However, given the Government's reliance on the Court's findings in the case of *Popov and Vorobyev v. Russia* (cited above, § 67, where it, having declared the applicants' complaint of inadequate medical assistance inadmissible, noted that they had not raised that issue before any domestic authority, including the administration of the detention centre, the prosecutor's office or the courts), the Court is ready to consider that, in addition to a complaint to a court and a civil tort action, two other venues are open to Russian inmates to complain about the quality of medical care in detention: a complaint to the administration of a detention facility or to a prosecutor. It will now examine whether any of the remedies suggested by the Russian Government were effective, as required by Article 35 of the Convention.

*i. Complaint to prison authorities*

79. As to a complaint to the administration of a detention facility, the Court notes that the primary responsibility of the prison officials in charge of a detention facility is that of ensuring appropriate conditions of detention, including the adequate health care of prisoners. It follows that a complaint of negligent actions by prison medical personnel would necessarily call into question the way in which the prison management had discharged its duties and complied with domestic legal requirements. Accordingly, the Court does not consider that the prison authorities would have a sufficiently independent standpoint to satisfy the requirements of Article 35 of the Convention (see *Silver and Others v. the United Kingdom*, 25 March 1983, § 113, Series A no. 61): in deciding on a complaint concerning an inmate's medical care for which they were responsible, they would in reality be judges in their own cause (see *Goginashvili v. Georgia*, no. 47729/08, § 55, 4 October 2011, and, more recently, *Ismatullayev v. Russia* (dec.), § 26, 6 March 2012).

*ii. Complaint to a prosecutor*

80. The Court will now consider whether a complaint to a prosecutor could have provided the applicant with redress for the alleged violation of his rights. The Court reiterates that the decisive question in assessing the effectiveness of raising a complaint of inhuman and degrading treatment before a prosecutor is whether the applicant could have done so in order to obtain direct and timely redress, and not merely an indirect protection of the rights guaranteed in Article 3 of the Convention. Even though the prosecutors' review undeniably plays an important part in securing appropriate conditions of detention, including the proper standard of medical care for detainees, a complaint to the supervising prosecutor falls short of the requirements of an effective remedy because of the procedural shortcomings that have been previously identified in the Court's case-law (see, for instance, *Pavlenko v. Russia*, no. 42371/02, §§ 88-89, 1 April 2010, and *Aleksandr Makarov v. Russia*, no. 15217/07, § 86, 12 March 2009, with further references). In particular, the Court has never been convinced that a report or order by a prosecutor, which both have a primarily declaratory character, could have offered the preventive or compensatory redress or both for allegations of treatment contrary to Article 3 of the Convention (see *Aleksandr Makarov*, cited above, § 86).

81. The Court further reiterates the Convention institutions' settled case-law, according to which a hierarchical complaint which does not give the person making it a personal right to the exercise by the State of its supervisory powers cannot be regarded as an effective remedy for the purposes of Article 35 of the Convention (see *Horvat v. Croatia*, no. 51585/99, § 47, ECHR 2001-VIII, and *Gibas v. Poland*, no. 24559/94, Commission decision of 6 September 1995, Decisions and Reports 82, pp. 76 and 82). The Court accepts the assertion that detainees may send their complaints to a prosecutor. However, there is no legal requirement on the prosecutor to hear the complainant or ensure his or her effective participation in the ensuing proceedings, which would entirely be a matter between the supervising prosecutor and the supervised body. The complainant would not be a party to any proceedings and would only be entitled to obtain information about the way in which the supervisory body dealt with the complaint. The Court reiterates that, in the absence of a specific procedure, the ability to appeal to various authorities cannot be regarded as an effective remedy because such appeals aim to urge the authorities to utilise their discretion and do not give the complainant a personal right to compel the State to exercise its supervisory powers (see *Dimitrov v. Bulgaria*, no. 47829/99, § 80, 23 September 2004). Moreover, the Court has already seen cases in which an applicant complained to a prosecutor but his complaint did not elicit any response (see *Antropov v. Russia*, no. 22107/03, § 55, 29 January 2009). Since the complaint to a prosecutor about the quality of medical assistance in detention does not give

the person using it a personal right to the exercise by the State of its supervisory powers, it cannot be regarded as an effective remedy.

*iii. Tort action*

82. The Court will further examine whether the tort provisions of the Civil Code constituted an effective domestic remedy capable of providing an aggrieved detainee redress for absent or inadequate medical assistance. The Court has already examined this remedy in several recent cases, in the context of both Article 35 § 1 and Article 13 of the Convention, and was not satisfied that it was an effective one. The Court found that, while the possibility of obtaining compensation was not ruled out, the remedy did not offer reasonable prospects of success, in particular because the award was conditional on the establishment of fault on the part of the authorities (see, for instance, *Roman Karasev v. Russia*, no. 30251/03, §§ 81-85, 25 November 2010; *Shilbergs v. Russia*, no. 20075/03, §§ 71-79, 17 December 2009; *Kokoshkina v. Russia*, no. 2052/08, § 52, 28 May 2009; *Aleksandr Makarov*, cited above , §§ 77 and 87-89; *Benediktov v. Russia*, no. 106/02, §§ 29 and 30, 10 May 2007; *Burdov v. Russia (no. 2)*, no. 33509/04, §§ 109-116, ECHR 2009; and, most recently, *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, §§ 113-118, 10 January 2012).

83. The provisions of the Civil Code on tort liability impose special rules governing compensation for damage caused by State authorities and officials. Articles 1070 and 1100 contain an exhaustive list of instances of strict liability in which the treasury is liable for the damage, irrespective of the State officials' fault. Inadequate medical care does not appear in this list. Only the unlawful institution or conduct of criminal or administrative proceedings gives rise to strict liability; in all other cases, the general provision in Article 1069 applies, requiring the claimant to show that the damage was caused through an unlawful action or omission on the part of a State authority or official.

84. The Court has already had occasion to criticise as unduly formalistic the approach of the Russian courts based on the requirement of formal unlawfulness of the authorities' actions. However, in its assessment of the effectiveness of tort proceedings for cases of inadequate medical care of detainees, the Court considers the following considerations to be more important. To prove the existence of the selection and successful use of mechanisms of redress, the Government cited two cases in which claimants, former inmates, had been granted compensation for damage to health resulting from inadequate medical care in detention. Without embarking on an analysis of the relevance of the cases to the case at hand and deciding whether the two cases sufficiently demonstrate the existence of a developed, consistent and coherent practice of remedies being available for victims of Article 3 violations resulting from a lack of medical assistance or its poor

quality, the Court reiterates that to be adequate, remedies for the implementation of accountability of a State should correspond to the kind and nature of the complaints addressed to it. Given the continuous nature of the violation alleged by the applicant, in particular his complaint of suffering from an extremely serious medical condition with a continuous deterioration of his health in the absence of appropriate medical treatment, the Court considers that an adequate remedy in such a situation should imply a properly functioning mechanism of monitoring the conduct of national authorities with a view to putting an end to the alleged violation of the applicant's rights and preventing the recurrence of such a violation in the future. Therefore, a purely compensatory remedial avenue would not suffice to satisfy the requirements of effectiveness and adequacy in a case of an alleged serious continuous violation of a Conventional right and should be replaced by another judicial mechanism performing both the preventive and compensatory functions.

85. The Court observes that the Government have not argued that a tort action could have offered the applicant any other redress than a purely compensatory award. Being convinced that a preventive remedial measure would have had an evidently pivotal role in a case such as the applicant's, with his pleas of ongoing deterioration of his health in view of a lack of proper medical care, the Court finds that a tort claim was not able to provide the applicant with relief appropriate for his situation. The purely monetary compensation afforded by a tort action could not extinguish the consequences created by the alleged continuous situation of inadequate or insufficient medical services. A tort claim would not have entailed the ending or modification of the situation or conditions in which the applicant found himself. It would not have brought about an order to put an end to the alleged violation and to compel the detention authorities to offer the applicant the requisite level of medical care and it would not have provided for any sanction for failure to comply, thus depriving a court examining the tort claim of the opportunity to take practical steps to eliminate the applicant's further suffering or to deter wrongful behaviour on the part of the authorities. This logic has been applied in a large number of cases raising an arguable claim under Article 3, with the Court insisting that if the authorities could confine their reaction in such cases to the mere payment of compensation, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity, and the general legal prohibition of torture and inhuman and degrading treatment, despite its fundamental importance, would be ineffective in practice. The State cannot escape its responsibility by purporting to erase a wrong by a mere grant of compensation in such cases (see, among many other authorities, *mutatis mutandis*, *Krastanov v. Bulgaria*, no. 50222/99, § 60, 30 September 2004; *Yaşa v. Turkey*, 2 September 1998, § 74, *Reports* 1998-VI; *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 79,

ECHR 1999-IV; *Velikova v. Bulgaria*, no. 41488/98, § 89, ECHR 2000-VI; *Salman v. Turkey* [GC], no. 21986/93, § 83, ECHR 2000-VII; *Gül v. Turkey*, no. 22676/93, § 57, 14 December 2000; *Kelly and Others v. the United Kingdom*, no. 30054/96, § 105, 4 May 2001; and *Avşar v. Turkey* [GC], no. 25657/94, § 377, ECHR 2001-VII).

86. In the light of the above considerations, the Court finds that also in the present case, concerning the continuous situation of absent or inadequate medical care in detention, a civil claim for damages did not satisfy the criteria of an effective remedy.

*iv. Judicial complaints of infringements of rights and freedoms*

87. The Court's final task is to assess the effectiveness of a complaint under Chapter 25 of the Code of Civil Procedure. By virtue of the provisions of Chapter 25, Russian courts are endowed with a supervisory jurisdiction over any decision, action or inaction on the part of State officials and authorities that has violated individual rights and freedoms or prevented or excessively burdened the exercise thereof. Such claims must be submitted within three months of the alleged violation and adjudicated in a speedy fashion within ten days of the submission. In those proceedings, the complainant must demonstrate the existence of an interference with his or her rights or freedoms, whereas the respondent authority or official must prove that the impugned action or decision was lawful. The proceedings are to be conducted in accordance with the general rules of civil procedure (see paragraphs 49-54 above).

88. If the complaint is found to be justified, the court will require the authority or official concerned to make good the violation of the complainant's right(s) and set a time-limit for doing so. The time-limit will be determined with regard to the nature of the violation and the efforts that need to be deployed to ensure its elimination. A report on the enforcement of the decision should reach the court and the complainant within one month of its service on the authority or official.

89. The Court notes that judicial proceedings instituted in accordance with Chapter 25 of the Code of Civil Procedure provide a forum that guarantees due process of law and effective participation for the aggrieved individual. In such proceedings, courts can take cognisance of the merits of the complaint, make findings of fact and order redress that is tailored to the nature and gravity of the violation. The proceedings are conducted diligently and at no cost for the complainant. The ensuing judicial decision will be binding on the defaulting authority and enforceable against it. The Court is therefore satisfied that the existing legal framework renders this remedy prima facie accessible and capable, at least in theory, of affording appropriate redress.

90. Nevertheless, in order to be "effective", a remedy must be available not only in theory but also in practice. This means that the Government

should normally be able to illustrate the practical effectiveness of the remedy with examples from the case-law of the domestic courts. The Russian Government, however, did not submit any judicial decision showing that a complainant had been able to vindicate his or her rights by having recourse to this remedy. The Court, for its part, has not noted any examples of the successful use of this remedy in any of the conditions-of-detention or medical-assistance cases that have previously come before it. The absence of established judicial practice in this regard appears all the more clear in the light of the fact that the Code of Civil Procedure, including its Chapter 25, has been in force since 1 February 2003 and that Chapter 25 merely consolidated and reproduced the provisions concerning a substantially similar procedure that had been available under Law no. 4866-1 of 27 April 1993 on Judicial Complaints against Actions and Decisions which have Impaired Citizens' Rights and Freedoms. The remedy, which has not produced a substantial body of case-law or a plethora of successful claims in more than eighteen years of existence, leaves genuine doubts as to its practical effectiveness. Admittedly, the ruling of the Plenary Supreme Court, which explicitly mentioned the right of detainees to complain under Chapter 25 about their conditions of detention, was only adopted in February 2009, but it did not alter the existing procedure in any significant way and its effectiveness in practice still remains to be demonstrated (see, for similar reasoning, *Ananyev and Others*, cited above, §§ 107-110). The Government also did not explain how, in the light of the ruling of the Plenary Supreme Court which concerned complaints of conditions of detention, the Chapter 25 procedure would work in respect of complaints of ineffective medical care for detainees, given the specificity of those complaints.

91. The Court therefore finds that, although Chapter 25 of the Code of Civil Procedure, as clarified by the Supreme Court's ruling of 10 February 2009, provides a solid theoretical legal framework for adjudicating detainees' complaints of inadequate conditions of detention, and possibly their complaints of ineffective medical care, it has not yet been convincingly demonstrated that that avenue satisfies the requirements of effectiveness.

*v. The applicant's requests for parole as a measure to draw the attention of the authorities to his situation*

92. Finally, the Court considers it necessary to address another aspect of the Government's objection of non-exhaustion. It would like to distinguish the present case from the case of *Popov and Vorobyev* (cited above), on which the Government relied in support of their arguments. While in the latter case the applicants did not raise an issue of ineffective medical care before any domestic authority, the Court reiterates that the applicant in the present case tried to avail himself of judicial protection. He, supported by the medical personnel of the colony hospital, lodged at least three requests

with the courts, unsuccessfully arguing that his state of health was so grave that his further detention was unlawful and inappropriate and seeking his conditional release (see paragraphs 37 - 43 above).

93. The Court notes that the domestic courts took cognisance of the merits of his complaints, sought the opinion of the prison administration on the possibility of the applicant being released and addressed the level of the medical care afforded to him in detention, having considered that it corresponded to the general standard of medical care provided in Russia and that the applicant had been "fully provided" with it (see paragraph 41 above).

94. The Court observes that the Government did not argue that, in pursuing this avenue of judicial review, the applicant had removed from the courts the option of examining the relevant issues. They merely insisted that a tort action or a complaint in compliance with the provisions of Chapter 25 of the Code of Civil Procedure were the proper formal judicial avenues applicable to the applicant's situation. Without altering its previous findings concerning the ineffectiveness of the two mechanisms (see paragraphs 82-86 and 87-91 above), the Court also does not consider it unreasonable that in a situation where the domestic courts had assessed, a number of times, the quality of medical assistance provided to the applicant in detention, he did not lodge a separate action or a complaint with the same courts following the formal procedures required by the Russian Civil Code or Code of Civil Procedure. In circumstances where the domestic courts at two levels of jurisdiction had examined and dismissed the applicant's complaints, having found that the quality of the medical assistance afforded to him in detention had fully complied with domestic legal norms, the Court's conclusion that a tort action or a separate judicial complaint could not offer the applicant a reasonable prospect of success becomes even more salient (see *Arutyunyan v. Russia*, no. 48977/09, §§ 64-65, 10 January 2012; *Guliyev v. Russia*, no. 24650/02, § 55, 19 June 2008; and *Valašinas v. Lithuania* (dec.), no. 44558/98, 4 March 2000).

**(b) Conclusion**

95. In the light of the above considerations, the Court concludes that none of the remedial avenues put forward by the Government in support of their argument of the applicant's failure to exhaust domestic remedies constituted in the present case an effective remedy. Accordingly, the Court dismisses the Government's objection as to the non-exhaustion of domestic remedies.

96. The Court further notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds. The complaint must therefore be declared admissible.

## 2. *Merits*

### (a) General principles

97. The Court reiterates 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, for example, *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV). Ill-treatment must, however, 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*, cited above, § 162).

98. Ill-treatment that attains such a minimum level of severity usually involves actual bodily injury or intense physical or mental suffering. However, even in the absence of these, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3 (see *Pretty v. the United Kingdom*, no. 2346/02, § 52, ECHR 2002-III, with further references).

99. 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 of deprivation of liberty 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*, cited above, §§ 92-94; and *Popov v. Russia*, no. 26853/04, § 208, 13 July 2006). In most of the cases concerning the detention of persons who were ill, the Court has examined whether or not the applicant received adequate medical assistance in prison. The Court reiterates in this regard that even though Article 3 does not entitle a detainee to be released "on compassionate grounds", it has always interpreted the requirement to secure the health and well-being of detainees, among other things, as an obligation on the part of the State to provide detainees with the requisite medical assistance (see *Kudła,* cited above, § 94; *Kalashnikov v. Russia*, no. 47095/99, § 95, ECHR 2002-VI; and *Khudobin v. Russia*, no. 59696/00, § 96, ECHR 2006-XII (extracts)).

100. The "adequacy" of medical assistance remains the most difficult element to determine. The Court insists that, in particular, authorities must ensure that diagnosis and care are prompt and accurate (see *Hummatov*

*v. Azerbaijan*, nos. 9852/03 and 13413/04, § 115, 29 November 2007; *Melnik,* cited above, §§ 104-106; *Yevgeniy Alekseyenko*, cited above, § 100; *Gladkiy v. Russia*, no. 3242/03, § 84, 21 December 2010; *Khatayev v. Russia*, no. 56994/09, § 85, 11 October 2011; and, *mutatis mutandis, Holomiov v. Moldova*, no. 30649/05, § 121, 7 November 2006), and that, where necessitated by the nature of a medical condition, supervision is regular and systematic and involves a comprehensive therapeutic strategy aimed at curing the detainee's health problems or preventing their aggravation (see *Hummatov*, cited above, §§ 109, 114; *Sarban v. Moldova*, no. 3456/05, § 79, 4 October 2005; and *Popov*, cited above, § 211).

101. On the whole, the Court reserves a fair degree of flexibility in defining the required standard of health care, deciding it on a case-by-case basis. That standard should be "compatible with the human dignity" of a detainee, but should also take into account "the practical demands of imprisonment" (see *Aleksanyan v. Russia*, no. 46468/06, § 140, 22 December 2008).

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

102. Turning to the circumstances of the present case, the Court observes that tests performed on admission of the applicant to the temporary detention facility in January 2004 revealed his infection with clinical stage 2 HIV. His history of tuberculosis infection was also noted by the detention facility's administration and he was considered in need of close medical supervision, regardless of his long-time clinical recovery from the latter infection. Despite the steady progression of the HIV infection with the disease having passed to clinical stage 3 towards the end of 2005 (see paragraph 15 above) and then to the stage 4 in the beginning of 2007 with a further rapid progression of the illness, a fact which was not included in the typed version of the applicant's medical records (see paragraph 18 above), the applicant did not receive any treatment in respect of his HIV infection. During all those years there was also no proper immunological assessment, involving specific testing, to determine when it was time to initiate antiretroviral therapy. It was not until 12 February 2009, that is more than five years after the authorities had learned about the applicant's illness and almost two years after the illness had reached its most severe clinical stage, that he commenced the therapy. This fact alone is sufficient for the Court to find that the authorities failed to comply with their responsibility to ensure the provision of adequate medical treatment to the applicant.

103. This conclusion is not altered by the Government's submissions that the applicant had delayed the initiation of antiretroviral therapy, having refused it on two occasions in June and August 2008 (see paragraph 23 above). The Court does not find the refusal surprising in a situation in which the applicant was receiving an intensive chemotherapy regimen of anti-tuberculosis treatment, a very aggressive medical procedure known for its

numerous side effects of which the applicant did not cease to complain. His reluctance to add more strong drugs to his daily treatment regime is understandable. The Court also does not lose sight of the fact that the applicant completed the intensive phase of the tuberculosis treatment in October 2008. However, the medical personnel only repeated their proposal to initiate antiretroviral therapy in February 2009.

104. Without altering its conclusion in paragraph 102 above, the Court would like to point out further features of the authorities' negligent attitude towards their responsibilities. It holds the authorities responsible for the relapse of the applicant's tuberculosis in 2008. The Court considers it open to criticism that a person with a compromised immune system, such as the applicant, could be detained, on more than one occasion, together with inmates suffering from an active form of tuberculosis (see paragraphs 19 and 20 above). It is also concerned that the typed version of the applicant's medical records did not include those two instances of detention with smear-positive tuberculosis inmates. The Court further observes that the authorities' response to the possibility of the applicant's tuberculosis relapsing was erratic and unregulated. His medical records do not bear any evidence that the doctor's recommendations to initiate treatment to prevent a relapse of the infection or to perform specific testing to assess the applicant's condition were followed through. The applicant only started receiving anti-tuberculosis treatment in May 2008, almost a year after the first instance of his detention with an infected inmate and after an X-ray examination had disclosed that the illness had progressed to the advanced stage. The Court is of the view that the applicant having developed multi-drug resistant tuberculosis, as well as the disease having become active merely months after he had completed an intensive phase of his anti-tuberculosis treatment, are the major signs of inadequate management of the applicant's health by the Russian medical authorities.

105. The Court is further concerned by the fact that despite the extreme seriousness of the applicant's condition, with his final diagnosis indicating that the HIV infection had progressed to AIDS with ongoing deterioration of his health, the antiretroviral therapy, vital for the applicant, was interrupted for almost a month when he was transferred to the temporary detention facility in November 2009. The evidence presented by the Government in support of the assertion that the applicant continued receiving treatment is unconvincing (see paragraph 30 above).

106. The Court also considers ambiguous the Government's insistence on the necessity of the applicant's transfer to a "specialised" medical facility, while they continued arguing that he had been fully provided with the necessary treatment in the colony hospital. The Court is mindful of the fact that neither the Government nor the domestic authorities, including the courts which examined the applicant's motions for release, explicitly named the "specialised" facility to which the applicant should have been

transferred. It appears that the sole reason for the transfer was the lack of reserve anti-tuberculosis drugs in the colony hospital. The applicant only started receiving them in the hospital at the end of November 2010. There is no reasonable explanation for such a lengthy delay between the discovery of the applicant's resistance to at least three major anti-tuberculosis drugs in the summer of 2009 and the introduction of the reserve anti-tuberculosis drugs into his treatment.

107. Finally, the Court considers particularly noteworthy the Government's argument, raised in their memorandum of 22 July 2011, that the applicant's condition was satisfactory to the point that he was no longer eligible for parole on health grounds. In their assessment of the applicant's state of health they relied on a report prepared by a medical panel from the tuberculosis hospital in May 2011. Without placing too much emphasis on the quality or credibility of the conclusions reached by the medical panel, the Court cannot but note that the applicant's death occurred approximately six months after the panel had drawn up its report.

108. To sum up, the Court finds that the applicant did not receive comprehensive, effective and transparent medical assistance in respect of his HIV and tuberculosis in detention. It believes that, as a result of this lack of adequate medical treatment, the applicant was exposed to prolonged mental and physical suffering diminishing his human dignity. The authorities' failure to provide the applicant with the requisite medical care amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention.

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

110. Having reached the above conclusion, the Court does not need to additionally examine whether there has been a violation of Article 3 on account of the conditions of the applicant's detention given the serious state of his health and the authorities' refusals to authorise his release (see *Aleksanyan*, cited above, § 220; *Isayev and Others v. Russia*, no. 43368/04, § 135, 21 June 2011; and *Arutyunyn*, cited above, § 82).

## III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

111. Lastly, the Court has examined the other complaints submitted by the applicant. However, having regard to all the material in its possession, and in so far as these complaints fall within the Court's competence, it finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. 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.

## IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

112. 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

113. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

114. The Government submitted that a finding of a violation would constitute sufficient just satisfaction.

115. The Court, making its assessment on an equitable basis and given the information that it has regarding the applicant's family situation, decides that the sum claimed by the applicant shall be paid in full to his mother, Mrs Koryak, plus any tax that may be chargeable.

### B. Costs and expenses

116. The applicant did not seek reimbursement of costs and expenses, and this is not a matter which the Court is required to examine of its own motion (see *Motière v. France*, no. 39615/98, § 26, 5 December 2000).

### C. Default interest

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

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* that the applicant's mother has *locus standi* in the proceedings;

2. Declares the complaints raised under Article 3 of the Convention admissible and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 3 of the Convention on account of the lack of provision of effective medical assistance to the applicant during his detention;

4. *Holds* that there is no need to examine the complaint under Article 3 of the Convention concerning the conditions of the applicant's continued detention in view of the authorities' refusal to release him;

5. *Holds* unanimously
(a) that the respondent State is to pay the applicant's mother, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 20,000 (twenty thousand euros) in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of the settlement, plus any tax that may be chargeable;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 13 November 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

| Søren Nielsen | Nina Vajić |
|---|---|
| Registrar | President |

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint concurring opinion of Judges Kovler and Steiner is annexed to this judgment:

N.A.V.
S.N.

# JOINT CONCURRING OPINION OF JUDGES KOVLER AND STEINER

We concluded, after serious hesitation, that there had been a violation of Article 3 of the Convention on account of a failure to provide the applicant with effective medical assistance during his detention. It is very difficult for a judge to substitute his or her own view for that of a professional doctor and to assess the effectiveness of medical assistance, especially in this case, because Mr Koryak suffered from tuberculosis long before his incarceration and also became an injecting heroin user (see paragraph 8). In some similar cases the Court has concluded that the domestic authorities afforded the applicants comprehensive, effective and transparent medical assistance (see, among recent cases, *Schebetov v. Russia*, no. 21731/02, 10 April 2012, §§ 76-77, and *Valeriy Samoylov v. Russia*, no. 57541/09, 24 January 2012, §§ 92-93). What convinced us to find a violation of Article 3 in this case was the fact that regular medical supervision, including frequent medical check-ups and clinical testing, had led to the conclusion that the applicant's condition had been stabilised, and that was just weeks before his death...

At the same time we regret that the Court did not consider it necessary "additionally" to examine another complaint raised by the applicant under Article 3 pertaining to the authorities' refusals to release him on parole in view of his state of health (see paragraph 109). We do not find the national courts' reasoning (see paragraphs 39 and 41) persuasive and are of the view that the applicant's situation was similar to that of Mr Aleksanyan (see *Aleksanyan v. Russia*, no. 46468/06, 22 December 2008). We are mindful of the conclusions of some national courts that the deterioration of prisoners' health does not justify their release (see, for example, *Sizov v. Russia*, no. 33123/08, 15 March 2011). The problem would therefore seem to be a systemic one.