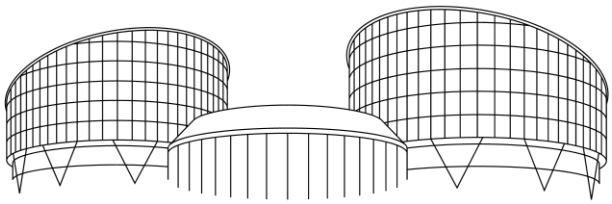

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF KONDRATYEV v. UKRAINE

(Application no. 5203/09)

JUDGMENT

STRASBOURG

15 December 2011

FINAL

15/03/2012

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

In the case of Kondratyev v. Ukraine**,**

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

Dean Spielmann, *President,*
Elisabet Fura,
Karel Jungwiert,
Boštjan M. Zupančič,
Mark Villiger,
Ganna Yudkivska,
Angelika Nußberger, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 15 November 2011,

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

PROCEDURE

1. The case originated in an application (no. 5203/09) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Sergey Vasilyevich Kondratyev ("the applicant"), on 15 January 2009.

2. The Ukrainian Government ("the Government") were represented by their Agents, Ms Valeria Lutkovska and Mr Yuriy Zaytsev.

3. The applicant alleged, in particular, that the medical assistance he received in respect of his knee injury and tuberculosis infection was inadequate, that his detention was unlawful, and that the length of his detention and the criminal proceedings against him had been excessive.

4. On 1 March 2010 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1962 and is currently serving a prison sentence.

A. Criminal proceedings against the applicant

6. Between 4.25 and 5.30 p.m. on 27 July 2007 the police, in the presence of the applicant, searched his house and found drugs allegedly belonging to him. After the search the applicant was taken to the Leninskyy District Police Station of Sevastopol and questioned about the matter. He was not allowed to leave the police station. According to the Government, at an unspecified time on the same day the applicant was detained under Article 263 of the Minor Offences Code; no document concerning this has been made available to the Court.

7. At 7 p.m. on 28 July 2007 an investigator drew up a detention record, pursuant to Article 115 of the Code of Criminal Procedure ("the CCP"), regarding the applicant, who was suspected of drug dealing committed on 27 July 2007. The applicant was then placed in the Sevastopol City Temporary Detention Centre (*Севастопольський міський ізолятор тимчасового тримання*, "the ITT").

8. According to the applicant, at the police station he was subjected to psychological pressure as a result of which he confessed to the possession of drugs and drug dealing.

9. On 30 July 2007 he was charged with drug dealing. Subsequently, new charges were brought against him and joined to the case. In particular, he was charged with the illegal possession of drugs in May-July 2007 and during his detention in Simferopol Temporary Investigative Isolation Unit no. 15 (*Сімферопольський слідчий ізолятор № 15*, "the SIZO").

10. By a decision of 31 July 2007 the Leninskyy District Court of Sevastopol ("the District Court") held that it was necessary to make further enquiries about the applicant and decided to remand him in custody for ten days. On the same date a lawyer of the applicant's own choosing was given permission to take part in the proceedings.

11. On 1 August 2007 the Tuberculosis Healthcare Centre in Sevastopol ("the TB Centre") issued a certificate indicating that the applicant had been registered there since 2000 and was suffering from "chronic infiltrative tuberculosis ("TB") of the left lung (degeneration phase: MBT+)", that he had undergone in-patient medical treatment from 2 to 13 March 2007 and "from 16 April to 28 July 2007, when [he had been] discharged [from the TB Centre] for a violation of therapeutic regimen", and that it was appropriate for him to be held in cells for persons suffering from an active form of TB.

12. On 6 August 2007 the District Court remanded the applicant to the ITT pending his transfer to the SIZO, without any indication of how long he would stay there. It noted that the applicant had been convicted of drug-related offences on several occasions, that he was suspected of having committed a serious crime, and that he had continued to engage in similar criminal activities after having served a prison sentence in October 2006.

The court also took into account information obtained from the TB Centre about the applicant's health condition.

13. According to the applicant, on 9 August 2007 he appealed against the remand order, stating in particular that he was not fit enough to remain in detention owing to the TB. On 29 September 2007 he lodged a complaint with the Leninskyy District Prosecutors' Office of Sevastopol alleging that from 27 to 28 July 2007 his detention had been unlawful. There is no information as to the outcome of the appeal and complaint or indication that the complaint was received by the authorities.

14. On completion of the investigations the applicant's case was referred for trial to the District Court, which, according to the applicant, held its first hearing in the case on 4 November 2007. According to the Government, this hearing was held on 1 November 2007.

15. On 15 May 2008 the applicant was transferred to the SIZO, but was periodically held at the ITT.

16. According to the applicant, on 17 June 2008 he lodged a complaint with the Leninskyy District Prosecutors' Office and the District Court, again alleging that his detention from 27 to 28 July 2007 had been unlawful. No document concerning this has been made available to the Court.

17. In a judgment of 24 October 2008 the court found the applicant guilty of the illegal possession of drugs and drug dealing, sentenced him to two years and six months' imprisonment and ordered the confiscation of all his property.

18. On 23 December 2008 the Sevastopol Court of Appeal ("the Court of Appeal") quashed the judgment, finding that the first-instance court had not questioned the applicant on each of the charges against him, and it remitted the case to the latter court for fresh consideration. The Court of Appeal also ordered the applicant to remain in detention, without providing reasons or a time-limit for the continued detention.

19. In 2009 the applicant's representative unsuccessfully tried to institute administrative court proceedings against the trial court, mainly for its failure to try the applicant in due time.

20. On 29 March 2010 the District Court ordered the Prosecutor's Office of the Leninsky District to investigate the applicant's complaints of psychological and physical pressure applied to him by unspecified police officers. On 31 March 2010 a prosecutor, having interviewed the police officers involved in the applicant's arrest and having studied his detention documents, found the complaints unsubstantiated.

21. In a judgment of 6 April 2010 the District Court convicted the applicant on four counts of drug dealing and running a centre for the production and use of illicit drugs, while striking off one count for want of proof of a crime. The applicant was sentenced to five years' imprisonment and the confiscation of all his property was ordered.

22. According to the parties' last submissions, on 16 November 2010 the Court of Appeal upheld the first instance judgment. The applicant received a copy of the decision on 25 January 2011. There is no indication whether he appealed in cassation.

23. According to the Government, during the criminal proceedings the courts and police heard fifteen witnesses and seven other suspects. Five forensic examinations were carried out.

24. Out of the twenty-seven court hearings scheduled in the course of the proceedings, thirteen were held, while four were adjourned for unknown reasons, two were adjourned due to both witness's failure to appear and the applicant's convoy's failure to bring him to the court, two were adjourned owing to the applicant's convoy's failure to bring him to the court, two were adjourned owing to the presiding judge's sickness, and one each was adjourned owing to prosecutor's vacation or his procedural request, the applicant's studying the case file, both the presiding judge's sickness and the applicant's convoy's failure to bring him to the court.

25. During the proceedings, the trial court ordered the police to escort witnesses for the hearings on 14 November 2007, 30 September and 9 November 2009. On the last-mentioned date the court adopted a separate resolution (*окрема постанова*), finding that the ITT had failed to escort the applicant to the hearings on a number of occasions. The court also requested the city police and prosecutors to ensure the applicant's escort to hearings. The applicant failed to lodge one of his appeals properly; it is unspecified how that delayed the proceedings.

B. Medical treatment and assistance provided to the applicant in detention

26. On 28 July 2007 the applicant informed the ITT that he had an active form of TB and was placed in a special cell. There is no indication whether the ITT had a medical practitioner on its staff.

27. On 8 February 2008 the TB Centre confirmed the applicant's diagnosis and specified that he required a prolonged course of chemotherapy.

28. On 15 May 2008 the applicant was admitted to the TB ward of the SIZO and was prescribed "H, R, Z, E" (anti-TB drugs, see paragraph 57 below) and some "vitamins and hepatoprotectors".

29. On 9 March 2009 the applicant fell down and injured his left knee while being transported to the ITT. He complained about it to the ITT administration. A doctor confirmed the injury and recommended, without specifying the degree of urgency, that the applicant consult a phthisiatrician.

30. When brought back from the ITT to the SIZO on 12 March 2009, the applicant was examined by the SIZO doctor, but raised no complaints about his health. According to a medical certificate of the SIZO doctor of 7 April

2010, "during the examination the applicant did not raise any complaints as he wished to get to his cell sooner".

31. On 18 March 2009 he complained to the SIZO doctor of severe left knee pain. On 20 March 2009 the doctor performed an X-ray examination and concluded that the knee cap was broken and displaced. According to the applicant, the SIZO provided him with no medical treatment in respect of that injury.

32. On 24 March 2009 he was examined by a doctor at the traumatology centre of Simferopol Town Hospital no. 6 (“the hospital”) and his knee was immobilised by a plaster cast.

33. On 2 April 2009 the applicant complained to the ITT administration about the injury to his left knee and subsequently was seen by an ambulance doctor.

34. According to the applicant, on 3 April 2009 the ITT ignored an ambulance referral for a medical examination of his knee and instead sent him to the SIZO. There is no indication he was advised such medical examination at the time.

35. On 3 June 2009 an X-ray of the applicant’s left knee revealed a closed fracture of the left knee cap, with some positive developments.

36. On 3 July 2009 the phthisiatrician of the TB Centre concluded that the applicant had “infiltrative TB of the upper part of the left lung (Category 4)”; it was recommended that he continue medical treatment for one and half month with “H, R, Z, E”.

37. On 7 July 2009 the traumatologist, having examined an X-ray of the applicant’s knee, found a healed fracture of the left knee cap and a contracture of the knee. According to him, the applicant did not need a surgical operation. The applicant was prescribed “a course of exercise therapy, Fastum Gel, and massage”. On 9 July 2009 the applicant was again seen by the traumatologist, who noted that he had already been prescribed adequate treatment in respect of the injury.

38. On 15 July 2009 the phthisiatrician found that the applicant had “infiltrative [TB] of the lungs (Category 4)” and recommended to continue taking “H, R, Z, E, and Levofloxacin”. The doctor indicated the appropriate dosage, frequency and duration for the drugs and also recommended some “vitamins and hepatoprotectors”.

39. On 28 September 2009 a doctor examined the applicant’s left knee and found no grounds for outpatient treatment or hospitalisation.

40. On 4 November 2009 a traumatologist examined the applicant and diagnosed him with a consolidated fracture of the left knee cap and a moderately expressed contracture of the left knee joint. He was prescribed medication and exercise therapy.

41. On 2 June and 20 August 2010 the phthisiatrician at the TB Centre examined the applicant, finding “post-TB residual changes and fibrosis in the upper part of the lungs (Category 5.1)”. He recommended that the

applicant undergo repeated courses of anti-relapse therapy, whose particulars were not given. According to the applicant, the doctor's conclusions of 2 June 2010 were not reliable for unspecified reasons.

42. On 20 August 2010 the applicant was discharged from the TB ward, which was unlawful, according to him, because he was still sick.

43. On 1 and 21 October 2010 the applicant began a course of anti-relapse therapy. He agreed to take the medication, yet questioned the effectiveness of the therapy.

44. On 2 November 2010 a panel of doctors from the Crimea Medical Forensics Bureau, having studied the applicant's medical records, including the one drawn up by the traumatologist on 26 October 2010, found that the left-knee fracture had healed, that there were no lasting residual effects of the injury, and concluded that the knee treatment provided by the Simferopol hospital had been timely and thorough.

45. While detained at the ITT, the applicant asked for medical assistance on 30 July, 14 and 23 August and 5 September 2007, 9 March, 31 March and 28 September 2009, and 1 April 2010. On each occasion the ITT administration called the ambulance, whose doctor came to see the applicant. His chest was X-rayed on 8 February and 15 May 2008, 23 January, 3 June and 10 July 2009, and 3 and 18 February, 2 June and 20 August 2010. The applicant underwent sputum tests on 16, 17 and 19 May, 1 July, 28 November and 1 and 2 December 2008, 23 and 24 January, 24, 25, 26 March, 4 June, 26 and 27 August and 22 September 2009, and 17 February and 20 August 2010, all of which were negative. On 4 June 2009 he underwent urine and blood analyses. According to the Government, during his detention in the SIZO the applicant received a high calorie diet and he was provided with some additional food. The applicant submitted that his food was poor and that there was no evidence he received medication and special food.

46. During his detention the applicant and his representatives lodged a number of complaints with the police, prosecutors, and courts alleging, *inter alia*, that the applicant was not receiving proper medical treatment. On 9 October 2009 the Sevastopol Prosecutor's Office refused to institute criminal proceedings against the ITT duty officer in that regard. The applicant did not appeal. According to the Government, after June 2010 the applicant did not complaint about his state of health. According to the applicant, he complained but his complaints were not dealt with.

47. After a number of inquiries, on 4 November 2010 the Zaliznychnyi District Prosecutor's Office of Simferopol refused to institute criminal proceedings against the head and the physician of the SIZO medical unit, the SIZO governor, and the head traumatologist of the Simferopol hospital. Apparently, the applicant did not appeal against that decision.

48. In 2010 the applicant's mother instituted court proceedings against the prosecutors for their negligence in respect of her son's TB infection. It appears that the proceedings are pending before an appellate court.

II. RELEVANT DOMESTIC AND INTERNATIONAL MATERIAL

A. Code of Criminal Procedure

49. Article 155 provides:

> "Persons in respect of whom taking into custody is imposed as a preventive measure are kept in places of detention pending trial, i.e., pre-trial detention centres [SIZOs]. In some cases, these persons may be kept in places for detained persons [ITT] ... for not more than three days. If transportation of remanded persons to the pre-trial detention centre ... is impossible within this time-limit because of the long distance or lack of appropriate roads, they may be kept in places for detained persons for up to ten days."

B. Combating Tuberculosis Act of Ukraine of 5 July 2001

50. Section 17 of the Act provides that persons suffering from tuberculosis who are detained in pre-trial detention centres (SIZOs) must receive appropriate treatment in the medical units of these detention centres.

C. Order of the Ministry of Health of Ukraine no. 384 of 9 June 2006 on Approval of the Protocol of Medical Assistance for Patients with Tuberculosis

51. According to the order, there are five main and five sub-categories for the recording of those who have TB or may be affected by it. For instance, patients with chronic TB of various localisation, with or without discharge of bacteria, fall into Category 4. Patients with residual changes of various localisation after the TB is cured fall into Category 5.1.

52. Under section 6.1, TB treatment is to be administered in specialised anti-TB institutions and to consist of two phases: main chemotherapy and rehabilitation. The main chemotherapy course, an extended, uninterrupted course of treatment, consists of intensive and supportive treatment stages with "first-line" anti-tuberculosis antibiotics (isoniazid, rifampicin, streptomycin, pyrazinamide and ethambutol or "H, R, S, Z, E").

53. Under section 6.6.1, to obtain maximal results, medical or surgical treatment of pulmonary TB is to be implemented in conjunction with individualized hygiene plan and regime (complete bed rest, part-time bed

rest or a training regime). Treatment is to be followed by rehabilitation, including curative exercise, massage and physiotherapy.

54. According to section 6.6.2., the diet of a patient with TB infection must take into account his living and working conditions, general state of the organism, its reactivity, nature of any injury, and complications from other organs. The diet should be balanced, yet rich in proteins, minerals, and vitamins, in particular the C, E and B groups. The intake of carbohydrates should be within the norms, or lower if the patient is overweight.

55. According to section 6.7, pulmonary TB patients of all categories are to be regularly monitored. For instance, Category 4 patients are to be monitored using the following tests: sputum every month for six months, then every two months; sensitivity to the anti-TB drugs and X-ray – at the beginning and once every six months afterwards. The patients with Category 5.1 TB should undergo X-ray at least every six months during the first year of monitoring.

56. Regular mandatory examinations to determine the effectiveness of the TB treatment and timely registration of side effects and their treatment as set out in Table 15 of the Protocol should be carried out.

57. According to the Table 15, if such anti-TB drugs as isoniazid, rifampin, pyrazinamide, and ethambutol ("H, R, Z, E") are administered, examinations and interviews of the patient, plus biochemical and common blood analysis, should be undertaken. The patient should also be examined by a neuropathist and ophthalmologist.

D. Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules (Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies)

58. The pertinent parts of the Rules read as follows:

"... Scope and application

10.1 The European Prison Rules apply to persons who have been remanded in custody by a judicial authority or who have been deprived of their liberty following conviction.

Health care

39. Prison authorities shall safeguard the health of all prisoners in their care. ...

Organisation of prison health care

...

40.4 Medical services in prison shall seek to detect and treat physical ... illnesses or defects from which prisoners may suffer.

40.5 All necessary medical, surgical and psychiatric services including those available in the community shall be provided to the prisoner for that purpose.

Medical and health care personnel

41.1 Every prison shall have the services of at least one qualified general medical practitioner.

41.2 Arrangements shall be made to ensure at all times that a qualified medical practitioner is available without delay in cases of urgency.

41.3 Where prisons do not have a full-time medical practitioner, a part-time medical practitioner shall visit regularly. ...

Duties of the medical practitioner

42.1 The medical practitioner or a qualified nurse reporting to such a medical practitioner shall see every prisoner as soon as possible after admission, and shall examine them unless this is obviously unnecessary. ...

42.3 When examining a prisoner the medical practitioner or a qualified nurse reporting to such a medical practitioner shall pay particular attention to: ...

b. diagnosing physical ... illness and taking all measures necessary for its treatment and for the continuation of existing medical treatment; ...

f. isolating prisoners suspected of infectious or contagious conditions for the period of infection and providing them with proper treatment;

43.1 The medical practitioner shall have the care of the physical ... health of the prisoners and shall see, under the conditions and with a frequency consistent with health care standards in the community, all sick prisoners, all who report illness or injury and any prisoner to whom attention is specially directed. ...

Health care provision

46.1 Sick prisoners who require specialist treatment shall be transferred to specialised institutions or to civil hospitals, when such treatment is not available in prison.

46.2 Where a prison service has its own hospital facilities, they shall be adequately staffed and equipped to provide the prisoners referred to them with appropriate care and treatment."

E. World Bank Report on a loan to Ukraine for a Tuberculosis and HIV/AIDS Control Project (28 December, 2009)

59. The pertinent parts of the Report read as follows:

"... Only the prisons setting has seen some progress in terms of decreased TB prevalence, TB notification rates, and TB mortality (although combined [Ministry of

> Health/ Sector Development Program]'s figures for mortality show an increase of 13% since 2003). These achievements are a result of progress made over the last five years to improve nourishment of inmates, increase drug supply and laboratory reagents, and provide better overall conditions in prisons (as a result of reductions made in the number of inmates). Also, severely ill patients have been released from the prison setting ... However, [Multiple Drug Resistant TB] in prisons is extremely high, at roughly 20% ... It is evident that since ... 1999, the reported cases of ... TB ... have seen a steady increase until 2006 with subsequent gradual decline as a result of steps taken by Government, including to double/quadruple the TB budget in 2006/2007/2008 vis à vis 2003/2004/2005 budgets. However, it should be noted that TB incidence in Ukraine remains one of the highest in the ECA region and is five times higher than the EU average ... The project did expand the laboratory network in the civil and the prison settings and with additional support from international and local donors and partners, as well as through Government own efforts, this network will be further improved."

F. Other relevant materials

60. The domestic law pertinent to the issue of the lawfulness of the applicant's detention is summarised in the judgments in the cases of *Nevmerzhitsky v. Ukraine* (no. 54825/00, §§ 53-54, ECHR 2005-II (extracts)); *Yeloyev v. Ukraine* (no. 17283/02, § 35, 6 November 2008); and *Gavazhuk v. Ukraine* (no. 17650/02, § 46, 18 February 2010).

61. Other domestic and international material concerning conditions of detention and treatment of TB infection in detention facilities can be found in the judgments in the cases of *Melnik v. Ukraine* (no. 72286/01, §§ 47-51, 28 March 2006, and *Yakovenko v. Ukraine* (no. 15825/06, §§ 53-54, 25 October 2007).

THE LAW

I. SCOPE OF THE CASE

62. In his reply to the Government's observations, on 11 September 2010 the applicant submitted new complaints under Article 3 of the Convention, alleging in particular that on 26 September 2007 the ITT staff had beaten him up with no effective investigation into the circumstances of the beating ensuing, and that the living conditions of his detention in and transportation between the SIZO and ITT had been poor. He further complained of an ineffective investigation into his complaints about inadequate medical treatment in detention. Additionally, on 7 February and 24 May 2011 he complained about inadequate medical treatment of his medical conditions at present. The Court notes that these new complaints

are not an elaboration of the applicant's original complaints on which the parties have commented. The Court considers, therefore, that it is not appropriate to take these matters up separately now (see *Vitruk v. Ukraine*, no. 26127/03, § 49, 16 September 2010). The new complaints will be dealt with under application no. 52233/11.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

63. The applicant complained that his detention had been contrary to Article 3 of the Convention, given his poor state of health. He also complained under the same provision that the authorities had failed to provide him with adequate medical treatment during his detention.

Article 3 of the Convention reads as follows:

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

A. Admissibility

64. The Government submitted that the applicant had not appealed against the decision refusing criminal prosecution of the ITT officials, and an inquiry in respect of the SIZO staff and the head traumatologist of the Simferopol hospital was pending. Accordingly, he could not claim to be a victim of violations of his rights under Article 3 of the Convention.

65. The applicant pointed out that he had in fact appealed against the decisions in respect of the SIZO officials and the Simferopol hospital.

66. The Court notes that it has already examined similar objections by the Government in a number of cases and found that the problems arising from the lack of proper medical treatment in Ukrainian places of detention were of a structural nature (see *Visloguzov v. Ukraine*, no. 32362/02, § 64, 20 May 2010 and *Petukhov v. Ukraine*, no. 43374/02, § 74-78, 21 October 2010). The Court sees no reason in the present case to depart from those findings and therefore considers that this complaint cannot be rejected for failure to exhaust domestic remedies. It therefore holds that the applicant complied with the rule of exhaustion of domestic remedies.

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

B. Merits

1. General principles

68. The Court has emphasised on a number of occasions that the health of prisoners has to be adequately secured (see *Kudła v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI). A lack of appropriate medical care may amount to treatment contrary to Article 3 (see *İlhan v. Turkey* [GC], no. 22277/93, § 87, ECHR 2000-VII, and *Sarban v. Moldova*, no. 3456/05, § 90, 4 October 2005). Where a prisoner returns from hospital with a known history of medical ailments, the authorities are under an obligation to ensure appropriate follow-up care independent of the initiative being taken by the prisoner (see *Tarariyeva v. Russia*, no. 4353/03, § 80, ECHR 2006-XV (extracts)).

69. In assessing whether the authorities discharged their health-care obligations vis-à-vis a detainee in their charge, the Court may also analyse to what extent his state of health deteriorated in the course of his detention. Although such deterioration does not in itself imply a violation of Article 3, it may, however, be considered to be a characteristic element of the overall conditions of detention (see, for example, *Valašinas v. Lithuania*, no. 44558/98, § 54, ECHR 2001-VIII, and *Farbtuhs v. Latvia*, no. 4672/02, § 57, 2 December 2004).

70. The Court has also held that Article 3 of the Convention cannot be interpreted as securing to every detained person medical assistance of the same level as "in the best civilian clinics" (see *Mirilashivili v. Russia* (dec.), no. 6293/04, 10 July 2007). It further held that it was "prepared to accept that in principle the resources of medical facilities within the penitentiary system are limited compared to those of civil[ian] clinics" (see *Grishin v. Russia*, no. 30983/02, § 76, 15 November 2007). On the whole, the Court reserves sufficient 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).

71. The other relevant principles determined by the Court in its case-law as regards Article 3 of the Convention in respect of medical treatment in detention are summarised in the case of *Ukhan v. Ukraine* (no. 30628/02, § 74, 18 December 2008).

72. The Court attaches particular importance to the seriousness of the fact that the applicant was suffering from TB, given the poor medical assistance and protection from that disease in Ukrainian detention facilities evidenced by the Court's findings in similar cases against Ukraine (see, for instance, *Yakovenko*, cited above, §§ 97-102, and *Pokhlebin v. Ukraine*, no. 35581/06, §§ 63-68, 20 May 2010) and relevant international reports

and material concerning the treatment of tuberculosis in Ukraine (see *Melnik*, cited above, §§ 47-53, and *Yakovenko*, cited above, §§ 53-55, 62, and 63). Even if there have been a number of improvements recently reported in respect of the treatment of TB in Ukrainian prisons, the Court must note concerns about Multiple Drug Resistant TB in prisons and the fact that Ukraine still has one of the highest TB incidences in Europe (see paragraph 59 above).

73. The Court's task in such cases is therefore to assess the quality of the medical services available to applicants and, if they have been deprived of adequate medical assistance, to ascertain whether this amounted to inhuman and degrading treatment contrary to Article 3 of the Convention (see *Sarban*, cited above, § 78, and *Yevgeniy Alekseyenko v. Russia*, no. 41833/04, § 104, 27 January 2011).

74. The Court will examine separately the medical assistance provided to the applicant in respect of the knee injury and the TB infection during his detention. The latter will also be considered in respect of two separate periods – before 15 May 2008, when he was held in the ITT, and between 15 May 2008 and 21 October 2010, the last date of known medical treatment.

2. Medical assistance in respect of the knee injury

(a) Submissions of the parties

75. The Government maintained that from the applicant's first complaint the authorities had been quick to react and had provided him with the appropriate care. Furthermore, the applicant had been periodically examined and treated accordingly. In general, the Government considered that the applicant had been provided with adequate medical treatment.

76. The applicant challenged the soundness of the diagnosis and the recommendations made by the ambulance doctor who had seen him on 9 March 2009. He complained of a lack of treatment for his knee over the period 9-24 March 2009 and that his medical treatment on 24 March 2009 had been insufficient as the plaster cast should have covered the entire leg. On 3 April 2009 the ITT had ignored an ambulance referral for a medical examination. As a result, he had deformation and contracture of his left knee joint which had not been operated on at all. Additionally, he had had no possibility to follow a course of exercise therapy and massage while detained. Finally, the conclusions of the examination of 2 November 2010 had been unreliable since they had not met the requirements for criminal procedures and the examination had been carried out in his absence.

(b) The Court's assessment

77. First, the Court notes that the applicant did not dispute that his complaints about the medical condition were recorded and acted upon by the administration of the ITT and the SIZO. All his complaints were communicated to the medical personnel of the SIZO and then/or to the ambulance service which dealt with them themselves or referred the applicant to the relevant specialist institution or medical practitioner.

78. In respect of the applicant's complaints about the lack of surgery and allegedly poor quality of the treatment he received on 9 and 24 March 2009, the Court is not in a position to decide whether the choice of treatment appropriately reflected the applicant's needs or whether he could have obtained better treatment from other health-care providers. As far as the quality of the diagnosis of 9 March 2009 is concerned, the Court notes that the diagnosis was indeed not precise. However, the doctor referred the applicant to another physician. A few days later the applicant was seen by the SIZO doctor, yet did not request to have his diagnosis clarified, nor did he complain about his injury. When he complained about the injury on 18 March 2009, he was X-rayed within two days and a fracture was diagnosed. Hence no fault lies with the authorities for the imprecise diagnosis, taking into account that the applicant did not address this issue when was brought back to the SIZO, in the absence of any indication that it was manifestly negligent and not acted upon in good time.

79. As regards the alleged lack of knee treatment between 9 and 24 March 2009 and the lack of a referral for a medical examination on 3 April 2009, the Court finds that no such treatment or referral was advised by the doctors. While the applicant argued that this medical condition had become worse with time, the doctors' conclusions of 2 November 2010 indicated the opposite. The Court discerns no ground to doubt the validity of these conclusions, since no alternative medical advice indicated otherwise nor did the applicant adduce any evidence that there was reason to doubt the doctors' credentials or credibility. Overall, the Court discerns no unjustified delays or other deficiencies in providing the applicant with appropriate medical advice and treatment in respect of this health condition. Nothing suggests that his knee injury was in principle incompatible with his detention either.

80. The Court is of the opinion that the authorities undertook sufficient measures in respect of the applicant's knee injury hence complying with the requirements of Article 3 of the Convention. Accordingly, there has been no violation of Article 3 of the Convention in this respect.

3. Medical assistance in respect of the TB infection

(a) Submissions of the parties

81. The Government maintained that the applicant had been kept in the ITT in accordance with the medical advice. Later on, in the SIZO, he had been placed in the medical unit's TB ward and registered for dispensary observation. He had been examined by the SIZO doctors periodically. He had undergone the necessary check-ups, had received adequate medical treatment and had been put on a high calorie diet. The findings made by the phthisiatrician on 2 June 2010 had illustrated the effectiveness of the medical treatment received by the applicant in the SIZO medical unit. Overall, there had been no medical conclusions indicating that the applicant's medical treatment in connection with his TB was only possible on an in-patient basis in a specialised medical institution. Therefore, the Government contended that there had been no violation of the applicant's right to adequate medical treatment in connection with his tuberculosis.

82. The applicant submitted that he had had no opportunity to have his medical conditions treated. In particular, his TB had been treated inappropriately, causing him suffering and anxiety. As a sign of the worsening of this medical condition, he had had episodes of coughing up blood in 2009. The doctor's conclusions of 2 June 2010 had not been reliable for unspecified reasons and his subsequent transfer to a cell designated for healthy inmates had been unlawful. The Government did not provide the Court with any document with his signature attesting that he had received appropriate medical treatment and special food.

83. Overall, even though the administration of the ITT and SIZO had recorded his complaints about his state of health, he had not been provided with any effective aid or treatment since the doctors that had been consulted had given him only painkillers.

(b) The Court's assessment

(i) Medical assistance between 28 July 2007 and 15 May 2008

84. The Court notes that before his detention the applicant had been receiving a course of anti-TB treatment at a specialised medical institution, which was interrupted once he was detained. The investigative authorities, by interrupting his treatment had therefore to follow up his health condition especially closely from 28 July 2007, the date they become aware of the applicant's TB infection, rather than 1 August 2007, when his health condition was confirmed (see paragraphs 11 and 26 above).

85. Before turning to the particulars of the medical assistance, the Court points out that the administration of the ITT complied with the doctor's recommendation and held the applicant in cells designated for those

suffering from TB. However, even if the ITT called an ambulance to the applicant whenever the need arose, the fact that there was no medical practitioner on the ITT staff is relevant and important. For instance, according to the domestic law (see paragraph 49 above), the applicant, after no more than ten days of detention in the ITT, should have been transferred to the SIZO. Thus, had the authorities complied with the regulations, the applicant would have been transferred to the SIZO no later than 16 August 2007, where he could have expected to receive treatment in the medical unit (see paragraph 50 above). His transfer took place, however, only on 15 May 2008, so nine months late. In the absence of any justification or explanation for this situation, the Court finds that the domestic procedure for medical assistance to the applicant, who was suffering from TB infection in detention, was not followed properly.

86. As regards the specifics of the medical assistance in the ITT, the Court notes that despite a number of consultations provided by ambulance, only on 8 February 2008, that is, after about six months spent in detention, the applicant underwent a chest X-ray and saw a specialist. Furthermore, at no time during his stay in the ITT he was medically examined, contrary to the relevant regulations (see paragraph 55 above).

87. As to the anti-TB treatment which should have been provided (see paragraph 52 above), there is nothing to indicate what treatment, if any, the applicant received before 8 February 2008. Moreover, after that date, when the TB Centre expressly indicated that he required a prolonged course of chemotherapy, there is no indication that the applicant was provided with treatment or monitored by a medical practitioner.

88. Furthermore, if the domestic requirement to treat TB in specialised institutions is taken into account, together with what the European Prison Rules applicable to the applicant's situation (see paragraph 58 above) entail, and the fact that the applicant was held in an ill-equipped detention facility without any anti-TB treatment, the Court also concludes that such conditions of the applicant's detention were incompatible with his health condition during this period.

(ii) Medical assistance between 15 May 2008 and 21 October 2010

89. The Court observes that on and after 15 May 2008 the authorities appeared to be establishing the extent of the applicant's health condition and prescribing the necessary treatment. For instance, when placed in the SIZO, he was admitted to a TB ward, X-rayed and prescribed medicine. Moreover, he was four times examined by a phthisiatrician and underwent various tests in monitoring his TB. The applicant was also administered a number of medicines. As of 21 October 2010 he was undergoing anti-relapse therapy.

90. The applicant maintains that the only treatment he received was consultations and painkillers, and that the food was poor. He did not specify when he in 2009 coughed up blood, or provide particulars or any documents

in support of this. At the same time, the Court finds no reason to doubt the validity of the doctor's conclusion of 2 June 2010, since no alternative medical advice indicated otherwise, nor did the applicant adduce any evidence that there was reason to doubt the doctors' credentials or credibility. The ensuing actions of the authorities do not therefore appear to have contradicted any medical advice or related regulations.

91. Yet the applicant's allegations of inadequate medical assistance before this Court, and those raised in the domestic proceedings, had a number of valid grounds. In particular, the applicant was diagnosed initially as having TB of the left lung, while on and after 15 July 2009 his condition affected both lungs. The Court further observes that there was no specific mentioning of the applicant's TB category before 3 July 2009, which was significant for determining the necessary assistance (see paragraph 55 above). This in itself is sufficient to conclude that the medical assistance before 3 July 2009 was not comprehensive. Furthermore, the doctor occasionally did not indicate the names, dosage or duration of administration of the all medicine prescribed or did not indicate specifics of the therapy (see paragraphs 28, 38 and 41 above). Moreover, between 3 July 2009 and 21 October 2010 (see paragraphs 36-49) not all of the required tests, analyses and examinations were carried out regularly or at all contrary to the domestic procedures (see paragraphs 55 and 57 above).

92. The Court notes that during the whole period under examination, no medical advice indicated what individualized hygiene plan and regime the applicant should follow, again contrary to the legal requirements (see paragraph 53 above). Nor was it demonstrated by the authorities what regime the applicant was provided with in the absence of proper advice. Likewise, there are no submissions containing the doctor's advice in respect of the applicant's diet, except those with prescriptions for vitamins, which still lack particulars. Furthermore, the applicant alleged that there was no evidence attesting that he had received special food. The Court notes that the Government indeed submitted no such evidence, nor did they specify what food he was given or when. The fact that the applicant was given a high-calorie diet, in the absence of relevant medical advice, appears not to be in compliance with the protocol (see paragraph 54 above).

93. In respect of the applicant's allegation that he should not have been held in detention owing to his health condition, the Court observes that he was treated in a TB ward before 20 August 2010 and his anti-TB treatment achieved some eventual improvements (see paragraphs 28 and 41-43 above). The Court cannot therefore conclude that the applicant's health condition was incompatible with his detention during this period of time.

94. Nevertheless, even if there were positive effects associated with the applicant's treatment, the Court finds that the deterioration of his health as found on 15 July 2009 coupled with failures to ensure that a comprehensive record of his state of health and the treatment he underwent was kept, that

medical supervision was regular, systematic and involving a comprehensive therapeutic strategy aimed at curing his diseases or preventing its aggravation, and that the necessary conditions were created for the prescribed treatment to be actually followed through were incompatible with the authorities' obligations under Article 3 of the Convention during this period of the applicant's detention.

(c) Conclusion of the Court

95. The Court finds that the failure to provide the applicant with the appropriate medical assistance in respect of his TB infection between 28 July 2007 and 21 October 2010 amounted to treatment prohibited by Article 3 of the Convention.

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

III. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

A. Lawfulness of the applicant's detention (Article 5 § 1 (c) of the Convention)

96. The applicant complained under Article 5 § 1 (c) of the Convention that his detention had been unlawful. The relevant provision of Article 5 of the Convention read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

1. Admissibility

97. The Government submitted that this complaint in respect of the applicant's detention from 27 to 28 July 2007 was inadmissible for non-exhaustion of domestic remedies, or, alternatively, as lodged out of the six-month time-limit.

98. The applicant contended that he had complained about that period of his detention before the domestic authorities, but they had failed to address the complaint.

99. The parties submitted no observations on admissibility of the complaint in respect of the other periods of his detention.

100. The Court recalls that the requirement of exhaustion of domestic remedies is intended to provide national authorities with the opportunity of remedying violations alleged by an applicant (see, *inter alia*, *López Ostra v. Spain*, judgment of 9 December 1994, Series A no. 303-C, p. 52, § 38; *Tomé Mota v. Portugal* (dec.), no. 32082/96, ECHR 1999-IX). While recognising the principle that an applicant is excused from pursuing domestic remedies which are bound to fail, the Court nevertheless finds that in such cases an applicant has to show either by providing relevant court decisions or by presenting other suitable evidence that a remedy available to him would in fact have been of no avail. The Court further observes that the existence of mere doubt as to the chances of success of a domestic remedy does not exempt an applicant from the obligation to exhaust it (see, *inter alia*, *Allaoui and Others v. Germany* (dec.), no. 44911/98, 19 January 1999 or *Tomé Mota*, cited above).

101. The Court reiterates that a person convicted at first instance cannot be regarded as being detained "for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence", but is in the position provided for by Article 5 § 1 (a) of the Convention, which authorises deprivation of liberty "after conviction by a competent court" (see *Kudła v. Poland* [GC], cited above, § 104).

102. The Court notes that according to the applicant, he complained about unlawfulness of his detention from 27 to 28 July 2007 before the domestic authorities twice (see paragraphs 13 and 16 above). However, there is no evidence that the authorities received those complaints. There is no indication that the applicant availed himself of domestic remedies on other occasions either. Nor did he demonstrate that he was excused from pursuing domestic remedies. Accordingly, he cannot be regarded as having exhausted domestic remedies in this respect.

103. Furthermore, from 24 October to 23 December 2008 and from 6 April 2010 onwards the applicant was held in custody after having been convicted by the first-instance court, a fact not disputed by the applicant. Hence, his detention during this period was not incompatible with the Convention.

104. It follows that this part of the application must be dismissed pursuant to Article 35 §§ 1, 3 (a) and 4 of the Convention.

105. As regards the applicant's detention from 6 October 2007 to 24 October 2008 and from 23 December 2008 to 6 April 2010, the Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

106. The Government did not specify what decision authorised the applicant's detention from 6 October 2007 to 24 October 2008, maintaining that during that period and between 23 December and 6 April 2010 the applicant was detained on the basis of a reasonable suspicion of having committed a criminal offence.

107. The applicant maintained that his detention from 6 October 2007 to 24 October 2008 and from 23 December 2008 to 6 April 2010 had been unlawful.

108. The Court notes that the District Court's decision of 6 August 2007 contained no reference to the authorised period of detention and was appealed against by the applicant. According to Article 115 of the CCP, and in the absence of any extension of the detention, the latter should have lasted less than two months, that is no longer than until 6 October 2007. Even supposing that the maximum period of detention was authorised on 6 August 2007, there was no decision that in any way allowed the deprivation of the applicant's liberty from 6 October 2007 to the date of the first hearing in the case. Furthermore, and regardless of the exact date of the first court hearing in those proceedings, the Court finds no court order to have been issued then or at any time later leading up to 24 October 2008, when the applicant was convicted.

109. The Court further observes that on 23 December 2008 the Court of Appeal, having quashed the applicant's conviction, ordered his retrial and further detention, yet provided no reasons and indicated no time-limit for his detention.

110. The Court has previously examined similar situations in other cases against Ukraine and found them to be incompatible with the requirements of lawfulness under Article 5 § 1 of the Convention. In particular, there were instances when continued detention before or during trial were not covered by any judicial decision (see, for example, *Yeloyev*, cited above, §§ 48-51; *Solovey and Zozulya v. Ukraine*, nos. 40774/02 and 4048/03, §§ 70-73, 27 November 2008; *Nikolay Kucherenko v. Ukraine*, no. 16447/04, §§ 37-38, 19 February 2009; and *Doronin v. Ukraine*, no. 16505/02, § 58, 19 February 2009). There have also been instances of failure of the judicial authorities to give reasons for their decisions authorising detention or to fix a time-limit for such detention (see *Yeloyev*, cited above, §§ 52-55, and *Doronin*, cited above, § 59). Moreover, in the judgment of *Kharchenko v. Ukraine* (no. 40107/02, §§ 98 and 101, 10 February 2011), the Court held that such a situation, where there are periods of detention not covered by any court order, or where the court orders made during the trial stage fix no time-limits for further detention, is a recurrent structural problem in Ukraine. There are no arguments in this case capable of persuading the Court to reach a different conclusion.

111. Taking into consideration all the above-mentioned circumstances, the Court concludes that the applicant's detention from 6 October 2007 to 24 October 2008 and from 23 December 2008 to 6 April 2010 was unlawful.

112. There has accordingly been a violation of Article 5 § 1 of the Convention in this respect.

B. Complaint under Article 5 § 3 of the Convention

The applicant further complained that that the overall length of his detention had not been justified. He referred to Article 5 § 3 of the Convention, which provides in so far as relevant as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

1. Admissibility

113. The Government did not submit any comments on the admissibility of this complaint.

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

2. Merits

115. The Government reiterated that there had been sufficient grounds for the applicant's detention and that the authorities had been diligent in dealing with his case.

116. The applicant maintained that his detention had been unnecessarily lengthy.

117. The Court reiterates that the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*. This must be assessed in each case according to its special features, the reasons given in the domestic decisions, and the matters referred to by the applicant in his applications for release. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty. In determining the length of detention pending trial under Article 5 § 3 of the Convention, the period to be taken into consideration begins on the day the accused is taken into custody and ends on the day when the charge is determined, even if only by a court of first instance (see, among others, *Labita v. Italy* [GC], no. 26772/95, §§ 145, 147

and 153, ECHR 2000-IV). The question whether or not the Court can look into complaints referring to a period which taken separately falls outside the six-month time-limit depends on the nature of the complaints and the type of violation alleged. Given that detention on remand is a continuous situation, the Court has on many occasions decided that where an accused person is detained for two or more separate periods pending trial, the reasonable-time guarantee of Article 5 § 3 requires a global assessment of the aggregate period (see *Solovey and Zozulya*, cited above, § 56, with further references).

118. The Court notes that it is not disputed by the parties that the applicant was arrested on 27 July 2007. On 6 April 2010 he was convicted by a a first-instance court for the second time and that conviction has remained in force. Thus the period to be taken into account commenced on 27 July 2007 and ended on 6 April 2010 and excluded the period of detention from 24 October to 23 December 2008, when the applicant was convicted for the first time. Accordingly the period at issue lasted for about two and a half years.

119. The Court observes that the seriousness of the charges against the applicant and the implicitly stated risk of his committing further crime were cited in the initial detention order. Thereafter, the courts did not advance any grounds whatsoever for maintaining the applicant's detention, even if there is no evidence that the applicant's request for release on medical grounds was ever lodged. However, Article 5 § 3 requires that after a certain lapse of time the persistence of a reasonable suspicion does not in itself justify deprivation of liberty, and the judicial authorities should give other grounds for continued detention. Those grounds, moreover, should be expressly mentioned by the domestic courts (see *Yeloyev*, cited above, § 60). No such reasons were given by the courts in the present case. Furthermore, at no stage did the domestic authorities consider any other preventive measures as an alternative to detention.

120. In this context, the Court notes that it has frequently found a violation of Article 5 § 3 of the Convention in cases raising issues similar to those in the present case (see, for example, *Tkachev v. Ukraine*, no. 39458/02, §§ 47-53, 13 December 2007; *Yeloyev*, cited above, §§ 60 and 61; *Doronin*, cited above, §§ 63-64; *Sergey Volosyuk v. Ukraine*, no. 1291/03, §§ 40-42, 12 March 2009; and *Molodorych v. Ukraine*, no. 2161/02, §§ 81-83, 28 October 2010). Moreover, in the judgment of *Kharchenko v. Ukraine* (cited above, §§ 99 and 101), the Court held that the tendency of the Ukrainian courts to repeatedly refer to the same set of grounds, if any, for lengthy periods of detention is a recurrent problem of a structural nature. There are no arguments in this case capable of persuading the Court to reach a different conclusion.

121. Accordingly, the Court concludes that there has been a violation of Article 5 § 3 of the Convention.

IV. COMPLAINT ABOUT THE LENGTH OF THE PROCEEDINGS AGAINST THE APPLICANT

122. The applicant further complained that the proceedings against him had been unreasonably long and that he had had no effective domestic remedy in respect of his length complaint. He relied on Articles 6 § 1 and 13 of the Convention, which read, in so far as relevant, as follows:

Article 6 § 1

"In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

Article 13

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

123. The Government contested these arguments and maintained that the proceedings had been conducted without unreasonable delays attributable to the authorities.

124. The applicant maintained his complaint.

125. The period to be taken into consideration began on 27 July 2007, when the applicant was detained, thus becoming substantially affected by the authorities' actions taken as a result of a suspicion against him. The period ended on 25 January 2011, when he received a copy of the final decision in his case. It thus lasted about three and a half years for two levels of jurisdiction.

126. The Court reiterates that, in assessing the reasonableness of the length of the proceedings in question, it is necessary to have regard to the particular circumstances of the case and the criteria laid down in the Court's case-law, in particular the complexity of the case and the conduct of the applicants and of the relevant authorities, and what was at stake for the applicants (see, for instance, *Kudła v. Poland* [GC], no. 30210/96, § 124, ECHR 2000-XI).

127. The Court notes that the applicant was in custody during the whole of the proceedings which cannot be considered particularly complex (see paragraph 23 above). It discerns no periods of substantial inactivity attributable to the applicant (see paragraphs 24 and 25 above).

128. Having regard to the conduct of the authorities, the Court notes that four of the hearings were adjourned for unknown reasons, which is not acceptable given the authorities' duty to keep good records of the proceedings. Neither is it acceptable that five hearings were adjourned owing to the authorities' failure to transport the applicant from the detention facility to the trial court. On the other hand the Court notes the trial court's

effort to speed up the proceedings when on three occasions it ordered the witnesses to be escorted to the hearings and it also drew the attention of the law enforcers to the need to ensure the applicant's presence at the hearings.

129. Regard being had to all the circumstances, the Court concludes that in the present case the overall length of the proceedings was not excessive and cannot be considered unreasonable (see, for example, *Shavrov v. Ukraine* (dec.), no. 11098/03, 11 March 2008, and *Kharchenko*, cited above, §§ 93-95).

130. It follows that this complaint under Article 6 § 1 is manifestly ill-founded. In the absence of any arguable claim under Article 6 of the Convention, the Court is not required to consider whether there were effective domestic remedies, as required by Article 13, for the above complaints. It follows that this part of the application must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

V. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

131. Lastly, the applicant alleged under Article 3 of the Convention that he had been subjected to psychological pressure by the police with the aim of extracting a confession. Under Article 5 of the Convention he complained about unlawfulness of his detention from 28 July to 6 October 2007. He also complained under Article 6 §§ 1 and 3 (a), (b), and (c) of the Convention that the proceedings had been unfair, alleging in particular that the authorities had violated his right to defence. Finally, the applicant complained of a violation of Article 14 of the Convention, stating that he had been discriminated against by the authorities in the course of the criminal proceedings against him.

132. Having carefully examined the applicant's submissions in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention. It follows that this part of the application must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

133. 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, costs and expenses

134. The applicant repeatedly requested the Court to ensure that he received adequate medical treatment in respect of his TB infection. He also stated his intention to lodge a claim in respect of pecuniary damage originating in his loss of disability payments in a separate application. He claimed 250,000 euros (EUR) in respect of non-pecuniary damage. He did not submit a claim in respect of costs and expenses.

135. The Government contested the claims.

136. Since the Court did not consider the adequacy of the applicant's medical treatment at present, as this matter is outside of the scope of the present application (see paragraph 62 above), it is not in position to entertain related requests under Article 41 of the Convention. On the other hand, it considers that the applicant has suffered anguish on account of the violations found. Making its assessment on an equitable basis and having regard to the particular circumstances of the case, the Court awards the applicant EUR 10,000 in respect of non-pecuniary damage.

137. In view of the applicant's submitting no claim for pecuniary damage, or costs and expenses, the Court awards him no compensation in that regard.

B. Default interest

138. 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

1. *Declares* unanimously admissible the complaints under Article 3, Article 5 §§ 1 (c) (unlawfulness of detention from 6 October 2007 to 24 October 2008 and from 23 December 2008 to 6 April 2010) and 3 (length of detention from 27 July 2007 to 24 October 2008 and from 23 December 2008 to 6 April 2010) of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* by five votes to two that there has been no violation of Article 3 of the Convention on account of a lack of adequate medical assistance in detention in respect of the knee injury;

3. *Holds* unanimously that there has been a violation of Article 3 of the Convention on account of a lack of adequate medical assistance in detention in respect of the tuberculosis infection;

4. *Holds* unanimously that there has been a violation of Article 5 § 1 (c) of the Convention;

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

6. *Holds* unanimously
(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, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Ukrainian hryvnias at the rate applicable on the date of settlement;
(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;

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

Done in English, and notified in writing on 15 December 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) concurring opinion of Judge Nußberger;
(b) partly dissenting opinion of Judge Yudkivska joined by Judge Spielmann.

D.S.
C.W.

CONCURRING OPINION OF JUDGE NUSSBERGER

I agree with the majority that there has been a violation of Article 3 of the Convention on account of the lack of adequate assistance in detention in respect of the applicant's infection. It is absolutely unacceptable that a detainee with an active form of TB should be placed in a special cell but not given any treatment at all. That is what happened to the applicant between 28 July 2007 and 15 May 2008, that is, for more than nine months. Although the TB Centre confirmed the applicant's diagnosis and specified that he required a prolonged course of chemotherapy, nothing was done. However, on 15 May 2008 the situation changed. The applicant was admitted to the TB ward, where he received continuous treatment and had the relevant medicines administered to him. It is beyond dispute that his health improved. Admittedly, even during this period of time the treatment was not perfect. The TB category was not mentioned, there was no individualised hygiene plan, the prison diet was not tailored to the applicant's needs and the medical assistance was still not comprehensive (see paragraph 91). Nevertheless, it has to be acknowledged that there was a huge difference between the period before 15 May 2008 and afterwards. Even though the treatment during the second period was far from perfect, I do not believe it reached the threshold required for a violation of Article 3 of the Convention. Therefore, I would have preferred the Chamber to take a more differentiated approach.

PARTLY DISSENTING OPINION OF JUDGE YUDKIVSKA JOINED BY JUDGE SPIELMANN

To my regret, I cannot share the opinion of the majority that there was has been no violation of Article 3 concerning the applicant's knee injury.

I note that the applicant still had full mobility when he was arrested in 2007, but that, according to the medical report of November 2009, he had "a consolidated fracture of the left knee cap and a moderately expressed contracture of the left knee joint" (see paragraph 40). This implies limitation of the knee's flexibility, hindering the applicant's movements.

It follows from the Court's case-law that a deterioration in a person's state of health in a detention facility inevitably raises doubts as to the adequacy of the medical treatment there (see *Khudobin v. Russia*, no. 59696/00, § 84, ECHR 2006-XII (extracts)). Thus it was up to the authorities to provide a plausible and convincing explanation for the applicant's mobility problem.

In the present case I observe that the applicant sustained his knee injury after falling down while being transported to the ITT. He complained immediately to an ITT doctor (see paragraph 29), who confirmed the injury but recommended that he consult a *phtisiatrician* – a tuberculosis specialist – although it was clear that the applicant needed to consult a trauma specialist who could assess the condition of his knee and treat it. Although for any broken bone medical assistance during the first few days appears to be crucial, the applicant did not receive any further help and was transferred back to the SIZO three days later, on 12 March, with a still broken and untreated knee cap.

The majority criticises the applicant for his failure to complain again on his arrival at the SIZO, or to insist on clarification of his diagnosis (see paragraph 78). I notice, however, that according to the medical certificate issued by the SIZO doctor, the applicant did not raise any complaint as he "wished to get to his cell sooner" (see paragraph 30). It is important to mention that transfer from the ITT to the SIZO could take up to two days in quite appalling conditions (see in this regard the Court's findings in the cases of *Yakovenko v. Ukraine*, no. 15825/06, §§ 105-113, 25 October 2007, and *Koktysh v. Ukraine*, no. 43707/07, §§ 107-108, 10 December 2009, concerning the conditions of transportation between the same ITT and SIZO as in the instant case); and for a person with a fractured knee, which causes unbearable pain, such a trip is exhausting. Hence, I do not consider that he could be reproached for his desire to get to his cell immediately and to rest after a gruelling journey.

The fact remains that the authorities knew about the applicant's knee problem as of 9 March, and I fail to see any practical obstacles to its immediate treatment in order to avoid negative consequences. Instead, this problem was first addressed on 24 March, about two weeks after the injury

occurred. Although the knee fracture had healed *per se*, it appears from the documents submitted that the knee remained deformed.

In the absence of any evaluation of the causes of this deformity, the most plausible explanation would appear to be that the applicant was not afforded appropriate medical treatment for the contracture. I therefore cannot conclude that the authorities undertook sufficient measures to ensure that the applicant was not subjected to treatment contrary to Article 3 of the Convention.