CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF POLUFAKIN AND CHERNYSHEV v. RUSSIA

(Application no. 30997/02)

JUDGMENT

STRASBOURG

25 September 2008

FINAL

26/01/2009

This judgment may be subject to editorial revision.

In the case of Polufakin and Chernyshev v. Russia,

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

Christos Rozakis, *President,*
Nina Vajić,
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyev,
Dean Spielmann,
Sverre Erik Jebens, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 4 September 2008,

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

PROCEDURE

1. The case originated in an application (no. 30997/02) 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 the Russian nationals, Mr Sergey Anatolyevich Polufakin and Mr Ivan Vladimirovich Chernyshev ("the applicants"), on 24 June 2002.

2. The applicants, who had been granted legal aid, were represented by Ms O. Belyachkova, a lawyer practising in Kazan. The Russian Government ("the Government") were initially represented by Mr P. Laptev, the Representative of the Russian Federation at the European Court of Human Rights, and subsequently by their Representative, Mrs V. Milinchuk.

3. On 20 January 2006 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

4. The Government objected to the joint examination of the admissibility and merits of the application. Having considered the Government's objection, the Court dismissed it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1966 and 1977 respectively and live in Naberezhnye Chelny, Tatarstan. They are currently serving their respective sentences in correctional facility UE-148/5 in Sviyazhsk, Tatarstan.

1. Pre-trial proceedings

6. On 6 December 2000 Mr D.E., Mr Yu.D. and Mr R.I. were transporting a travel bag with a large sum of money belonging to their employer, Ms S.S., in a car owned by Mr V.G. At about midnight the car was stopped by four armed persons disguised as policemen. Two of them had portable radios. They robbed Mr D.E., Mr Yu.D. and Mr R.I. and beat them up before stealing the travel bag and some other items from the car and leaving.

(a) The applicants' account

7. In the evening of 7 December 2000 the applicants were in Mr R.'s flat together with Mr Sh. At around 10 p.m. the police entered and searched the flat. They found a travel bag with money and two portable radios.

8. At 11 p.m. on 7 December 2000 the applicants, Mr Sh. and Mr R. were arrested on suspicion of robbery. The arrest was ordered by a prosecutor. The report on the applicants' arrest was drawn up at 4 p.m. on 8 December 2000.

9. Following his arrest, the first applicant was searched in the absence of a lawyer. The police found a wallet in his pocket with a list of towns and traffic police posts located near the road where the crime had been committed.

10. On 8 December 2000 the second applicant was questioned by investigators in the absence of a lawyer.

11. On 9 December 2000 the investigator ordered the first applicant's placement in custody as a measure of restraint. On an unspecified date the same measure was applied to the second applicant. Later, the respective terms of the applicants' pre-trial detention were extended several times by the prosecutor.

12. When asked where he had got the money found in Mr R.'s flat, the first applicant explained that he had borrowed it from an acquaintance of his, Mr L. The second applicant said that he had borrowed the money from three persons: his sister, Mr M.A. and Mr I.P.

13. The investigator questioned Mr L. The printed version of Mr L.'s statement read "I did not give [the first applicant] any money".

14. The second applicant's sister confirmed her brother's account of events when questioned by the investigator. Mr M.A. and Mr I.P. were not questioned.

15. The first applicant told the investigator that at about 1 a.m. on 7 December 2000 he had bought some food in a night shop "M." and requested that sales assistants from the shop be questioned. On 5 May 2001 the request was refused.

16. The first applicant further requested the investigators to question Mr Yu.I., an employee of a petrol station who had allegedly seen him on the night of the crime.

17. On unspecified dates Mr D.E., Mr Yu.D., Mr R.I., Mr V.G. and Ms S.S. were granted victim status and were questioned by the investigator.

18. The applicants did not participate in any identification parade before the victims and did not confront them.

19. The first applicant told the investigators that the list of towns seized from him during the search had been put into his pocket by a police officer, Mr T. The investigator ordered a graphology examination of the document. The expert report stated that one set of handwriting was identical to that of the first applicant. The first applicant insisted that the expert report had not attributed the handwriting to him.

20. Two other witnesses, Mr G. and Mr Tr., apparently police officers, were questioned by the investigator.

21. While in pre-trial detention, the first applicant received a handwritten note allegedly containing threats. He believed that the note had been written by one of his co-accused, Mr Sh.

22. Upon completion of the investigation the applicants were allowed to study the case file.

23. On 5 July 2001 the prosecutor drew up a bill of indictment charging Mr R., Mr Sh. and the applicants with aggravated robbery with violence, destruction of property, illegal possession of arms, possession of drugs and theft of official documents. The case file was transmitted to the court.

(b) Information submitted by the Government

24. Following their arrest, the first and second applicants were questioned as suspects on 8 and 9 December 2000 respectively. Neither of them confessed to any crimes.

25. On 14 December 2000 criminal charges were brought against the second applicant; on the same date he had been questioned as an accused in the presence of counsel, Mr V.T. The second applicant made no statements referring to his right to remain silent.

26. On 14 or 15 December 2000 the first applicant was officially charged and questioned as an accused in the presence of officially assigned counsel, Mr O.P. The first applicant informed the investigators that he

wanted to retain Mr M.; the latter was notified of the first applicant's request.

27. On 21 December 2000 the investigators questioned Mr Yu.I. He said that he could not remember which cars had been refuelled at the station on the night of 6 to 7 December 2000.

28. At some point the second applicant informed the investigators that he wanted to retain Mr A. as counsel. Mr A was then notified of the request.

29. On 23 March 2001 the applicants were visited by their relatives and asked them to retain Mr M. and Mr. A. as counsel.

30. At some point the first applicant informed the investigators that, since Mr M. had not visited him, he wanted to retain Mr A. He rejected assistance offered by other lawyers. On 24 March 2001 the first applicant's mother, Mr M. and Mr A. were notified of his intention. On an unspecified date the head of the Advocates Office informed the investigators that the first applicant had signed no contracts for legal representation with either Mr M. or Mr A. On 3 April 2001 the investigator dismissed the first applicant's request to retain Mr M. and Mr A. on the ground that he had not registered their appointment with the Advocates Office.

31. On 2 April 2001 both applicants were charged with another offence in the presence of Mr O.P., Mr V.T. and Mr A. They refused to make any statements and stated that they did not need the lawyers' assistance. The applicants studied the case file separately from Mr P. and Mr V.T.

32. On 5 May 2001 the investigator refused a request for additional questioning of Mr Yu.I.

2. Court proceedings

(a) First-instance proceedings

33. On 17 July 2001 the trial against the applicants and their two co-accused commenced in the Leninskiy District Court of the Republic of Chuvashiya ("the trial court").

34. According to the first applicant, on 17 July 2001 he challenged Mr O.P. as counsel because he had seen the lawyer's last name appear as the name of a police officer in a search report drawn up in respect of one of the first applicant's co-accused. On 24 July 2001 Mr O.P. was not present at the hearing.

35. According to the Government, on an unspecified date the second applicant stated that he did not wish to have Mr V.T. as counsel and asked to retain Mr A. Between 18 October and 8 December 2001 he was represented by Mr V.T. The trial court asked the first applicant whether he wished to appoint another lawyer, Mr I., as his counsel; the first applicant submitted that he did not need any assistance from lawyers. On 19 September and 21 October 2001 the first applicant again submitted that

he needed no lawyers; he did not allege that his decision to defend himself had been motivated by any financial difficulties.

i. Victims' and witnesses' statements

36. On 17 July 2001 the first applicant requested the trial court to summon Mr Yu.I. and the sales assistants from the night shop "M." who could confirm his alibi. The trial court agreed to summon Mr Yu.I. but refused to summon the sales assistants because their personal particulars were unknown.

37. On 17 July 2001 the trial court summoned the five victims to attend the hearing scheduled on 24 July 2001.

38. By letter of 18 September 2001 the victims informed the trial court that they refused to attend the hearing. Mr D.E., Mr Yu.D., Mr V.G. and Ms S.S. explained that they did so in the interests of their own security and that of their families. Mr R.I. said that he could not be absent from work as there was no one to replace him. All the victims also confirmed their pre-trial depositions and requested them to be read out at the trial in their absence.

39. On 24 September 2001 the trial court summoned the five victims of the crime to attend the hearing scheduled on 8 October 2001.

40. On 5 October 2001 Mr D.E., Mr Yu.D., Mr R.I., Mr V.G. and Ms S.S. sent the trial court a letter identical to that of 18 September 2001.

41. On 26 October 2001 the trial court asked the parties if they had any objections to the reading out of the victims' pre-trial statements. The defence objected, while the prosecution proposed to grant the victims' request. The trial court found that the victims had not appeared at the hearing for a valid reason; that measures to ensure their attendance had been repeatedly taken; and that the victims had notified the trial court of their absence in advance. The victims' pre-trial statements were read out.

42. On 11 October 2001 the first applicant requested the trial court to summon Mr L. in order to clarify one point in his statement. The record of Mr L.'s pre-trial statement had been visibly corrected in pencil to the effect that the printed words "I did not give him any money" were replaced by "I have already given him the money", which reversed the sense of the statement. The trial court granted the request. Mr L. failed to attend the hearing. According to the applicants, the trial court noted that the latter had been busy at work and asked each co-accused and their lawyers whether there were any objections to the reading out of Mr L.'s pre-trial statement. The first applicant objected. The court did not read out the statement but noted that the applicants themselves had made the correction while studying the case file.

43. On an unspecified date the court granted a request by the first applicant to summon Mr Yu.I. The latter's mother informed the trial court

by telephone that her son had left home and that his whereabouts were unknown.

44. Mr R.'s lawyer requested the trial court to summon Mr K., a prosecution witness who had been in Mr R.'s flat on the night of the events and who had stated that he had seen two unknown persons. The trial court noted that it was impossible to establish Mr K.'s whereabouts.

45. On 26 October 2001 the trial court ruled on whether the statements of the absent witnesses should be read out. According to the Government, the defence raised no objections to the reading out of the pre-trial statements of Mr Yu.I., Mr K. and Mr L. According to the applicants, the defence objected to the reading out of the statements of Mr K. and Mr L. The record of the trial contained a note "No objections". The printed wording of Mr L.'s statement and the statements by Mr Yu.I and Mr K. were read out.

46. The trial court questioned the investigator who had dealt with the applicants' case. He said that he had heard Mr L. saying that he had not given any money to the first applicant.

47. The first applicant requested to summon Mr T., the police officer who had allegedly put the seized list of towns in his pocket. The court refused the request on the ground that Mr T. was on a business trip. Later, Mr T. appeared before the court and stated that an unidentified police officer had found the list of towns in the first applicant's pocket.

48. Mr R. testified against the second applicant in court in respect of the charge of illegal possession of arms.

49. The second applicant requested to summon Mr I.P., who had allegedly lent him part of the money that the police had found in Mr R.'s flat. According to the second applicant, the court refused to do so because Mr I.P. had left Chuvashiya; the second applicant submitted that the investigators and the court had been aware of Mr I.P.'s whereabouts. The Government submitted that the court had summoned Mr I.P. but he had failed to appear at the hearing.

50. The trial court granted a request by the second applicant to summon another defence witness, Mr M.A. The latter did not attend the hearing.

51. On an unspecified date the court dismissed the first applicant's request to summon the sales assistants who could allegedly confirm his alibi on the ground that they could not remember the first applicant because almost a year had elapsed between December 2000 and October 2001.

52. The second applicant requested to summon officers of the traffic police squad who had been on duty at the police post near the crime scene on 6 December 2000. He submitted that the squad should have registered all cars passing by the police post and the fact that his car had not been seen by the police could have confirmed his alibi. On an unspecified date the court dismissed the request on the ground that the policemen could not remember all the cars they had seen that night.

53. The court read out the pre-trial statement by the second applicant's sister confirming that she had given her brother the money.

54. The statements of two prosecution witnesses, Mr G. and Mr Tr., were not read out at the hearing; the trial court did not take them into consideration.

ii. The applicants' statements

55. On 18 October 2001 the first applicant requested the trial court to declare the record of his pre-trial questioning inadmissible evidence on the ground that he had been questioned in the absence of a lawyer. He alleged that he had made a self-incriminating statement under police pressure. According to the first applicant, the trial court delivered no ruling in this respect and read out the pre-trial statement.

56. The second applicant testified at the trial. As his testimony differed from his pre-trial statement, the court decided to read out the latter.

iii. The applicants' interlocutory applications and requests

57. The first applicant challenged the stipendiary judge and the lay judges. He submitted that the bill of indictment had been based on inadmissible evidence. On 11 October 2001 the trial court dismissed the challenge as unsubstantiated.

58. Requests by the first applicant to order an additional graphology examination of the list of towns seized from him and a graphology examination of the threatening note presumably written by Mr Sh. were dismissed.

59. Both applicants challenged the court's secretary, claiming that she had erred when drafting the record of the trial. The challenge was dismissed on 29 October 2001 as unsubstantiated.

60. The trial court dismissed a request by the applicants to organise a reconstruction of the events.

61. Certain items of physical evidence collected by the investigation were not presented at the trial. The trial court read out the expert's report of his examination of the said items drawn up at the pre-trial stage. The first applicant requested to summon the expert who had drawn up the report. The request was dismissed.

iv. The applicants' conviction

62. On 8 November 2001 the trial court found the first applicant guilty of robbery with violence and the second applicant of robbery with violence and illegal possession of firearms and sentenced each of them to nine years' imprisonment. The applicants were acquitted of the other charges.

63. The trial court found that the applicants' guilt was confirmed by the statements of all the victims, the prosecution witnesses – that is, the investigator, Mr T., Mr K. and Mr L. – and in particular by the statement of

Mr L. that he had not given any money to the first applicant, and other items of evidence, including the list of towns seized from the first applicant and two portable radios belonging to the applicants. The trial court further found that no credit could be given to the statement of the second applicant's sister because she had only been trying to help her brother.

64. When enumerating the pieces of evidence in the judgment, the trial court summarised the second applicant's pre-trial statement as follows: "[the second applicant] had 100,000 roubles' worth of money. They had no portable radio transmitters. Mr Polufakin and [the second applicant] each kept the money in their plastic bags." It did not expressly rely on that statement to prove the second applicant's guilt.

65. On 17 November 2001 the second applicant sent his comments on the record of the trial to the trial court. He noted, in particular, that it was recorded on page 71 that there had been no objections to reading out the witnesses' pre-trial statements despite the fact that he had objected and had requested that the witnesses' reasons for their absence be stated.

66. On 21 November 2001 the trial court agreed to amend the record of trial in accordance with some of the second applicant's comments. Numerous comments, including the one concerning page 71, were rejected.

(b) The second-instance proceedings

67. The applicants appealed to the Supreme Court of the Republic of Chuvashiya ("the appeal court") against the first-instance judgment on the grounds, *inter alia*, that the victims and the prosecution witnesses had not been questioned at the trial and that certain points of the victims' and witnesses' pre-trial statements had not been clarified. They further alleged that the trial court had relied on inadmissible evidence and that the expert examination report of the physical evidence had been expressed with a certain degree of probability. The first applicant complained about the trial court's refusal to conduct an additional graphology examination of the list of towns but did not expressly raise an issue of inadmissibility as evidence with regard to this item.

68. The second applicant's lawyer, Mr A.T., was absent at the appeal hearing. According to the second applicant, his request to adjourn the hearing due to the lawyer's absence was dismissed by the court. According to the Government, Mr A.T. was duly informed of the date of the appeal hearing but failed to attend it. The second applicant did not request to postpone the hearing due to his lawyer's absence. The appeal court studied Mr A.T.'s points of appeal. The first applicant defended himself before the appeal court.

69. On 8 January 2002 the appeal court upheld the judgment of 8 November 2001. It stated, *inter alia*, that the applicants' guilt had been proven by the victims' pre-trial statements and other evidence, and that the guilt of the first applicant had also been proven by the list of towns found in

his wallet. The appeal court further noted that the trial court had taken measures to secure the victims' and witnesses' presence and that their statements had been read out in accordance with domestic law.

(c) The applicants' further requests

70. The trial court dismissed requests by the applicants for access to the case file on 15 and 21 November 2001.

71. Requests by the applicants for supervisory review were dismissed by the Supreme Court of the Republic of Chuvashiya on 3 and 14 March 2003 and by the Supreme Court of Russia on 14 November 2003 and 15 March 2004.

72. The applicants also complained to the Ombudsman of the Russian Federation, but to no avail.

3. Conditions of detention

(a) The applicants' account

73. Between 8 and 18 December 2000 the applicants were kept in the temporary detention centre of Cheboksary. The conditions of detention there were poor. In particular, the first applicant's cell, located in the basement, was not equipped with a lavatory pan; there was no running water; and the temperature was below 10º Celsius.

74. Between 18 December 2000 and 24 January 2002 the applicants were kept in the remand prison of Cheboksary. The first applicant's cell was overcrowded and scantily equipped. On his arrival at the remand prison the first applicant underwent blood tests that revealed no infection with hepatitis C.

75. Between 24 January and 16 February and 19 May and 4 June 2002, the first applicant was kept in remand prison IZ-16/2, Kazan. The second applicant was kept there between 24 January and 22 February 2002. Their cells were overcrowded.

76. Between 17 and 23 February and 17 and 18 May 2002, the first applicant was kept in remand prison IZ-66/1, Ekaterinburg. At some point he shared a cell with some eighty inmates.

77. Between 26 February and 4 March 2002 the first applicant was kept in remand prison IZ-24/1, Krasnoyarsk. His cell was overcrowded. On 28 February 2002 the first applicant complained in writing to the head of the Federal Penitentiary Service (*Федеральная служба исполнения наказаний, ФСИН* – hereinafter "the FSIN") of the Krasnoyarsk Region of the poor conditions of his detention; of the fact of his transfer to Siberia; and of unlawful acts by the convoying officers that had escorted him. He also requested that he be placed in an infirmary and provided with an inhalator. He received no reply to his complaint.

78. Between 5 and 7 March and 14 and 26 April 2002, the first applicant was kept in the transit area of detention facility U-235/15, the Krasnoyarsk Region. On 5 March 2002 he complained to the head of the FSIN of the Krasnoyarsk Region of the poor conditions of detention. He received no formal reply, but was interviewed by the head of the transit area.

79. Between 7 March and 14 April 2002 the first applicant was kept in Central Hospital No. 2, the Krasnoyarsk Region, in satisfactory conditions. While in hospital, he underwent blood tests that revealed no infection with hepatitis C.

80. Between 27 April and 16 May 2002 the first applicant was kept in remand prison IZ-55/1, Omsk. He shared a cell with eighteen inmates. The windows in the cell were covered with iron sheets.

(b) The Government's account

81. Between 24 January and 16 February and 19 May and 4 June 2002, the first applicant was kept in remand prison IZ-16/2, Kazan. The cells were properly equipped. Inmates had an opportunity to use sanitary installations when necessary and could wash in a bath-house once a week.

82. The first applicant was detained in remand prison IZ-66/1, Ekaterinburg, between 18 and 23 February 2002. His cell measured 35 sq. m and held nine inmates together with the first applicant. He was also kept in that facility from 17 to 18 May 2002 in a cell which measured 17 sq. m and held thirteen inmates.

83. Between 26 February and 4 March 2002 the first applicant was detained in remand prison IZ-24/1, Krasnoyarsk. His cell measured 45 sq. m and was equipped with twenty-six beds. At the material time it held twenty-two inmates. The first applicant made no complaints concerning the conditions of his detention to employees of the prosecutor's office of the Krasnoyarsk Region who regularly visited IZ-24/1.

84. Between 5 and 7 March and 14 and 26 April 2002, the first applicant was kept in the transit area of correctional facility U-235/15, the Krasnoyarsk Region. He was kept in a cell measuring 50 sq. m. No more than fourteen other inmates were kept there at the same time as the first applicant.

85. Between 7 March and 14 April 2002 the first applicant was kept in Central Hospital No. 2 of the Main Department of the FSIN of the Krasnoyarsk Region. He underwent a medical check-up. As a result, he was diagnosed with post-traumatic arthritis of the left knee and considered unfit to serve the sentence in the penitentiaries of the Krasnoyarsk Region.

86. Between 27 April and 16 May 2002 the first applicant was detained in remand prison IZ-55/1, Omsk. He shared a cell, which was designed for four persons, with three inmates.

4. Conditions of transportation of the first applicant

(a) The first applicant's account

87. On an unspecified date it was decided that the first applicant should be transferred from Kazan to the Krasnoyarsk Region to serve his sentence.

88. At the Kazan railway station the first applicant and twelve to fifteen other detainees were placed in a special carriage for detainees in a compartment designed for eight persons. As there was not enough space, the convoying officers used force when placing the detainees in the compartments.

89. The conditions of transportation were extremely poor: the first applicant and other detainees were underfed during the journey; before leaving remand prison IZ-66/1, Ekaterinburg, the first applicant had received three loaves of bread from the authorities and was not given any other food for the next three days of transportation by rail.

90. At various railway stations detainees were escorted by different groups of convoying officers. When loading detainees onto trains at railway stations, members of each convoying group used similar practices. In particular, once at a railway station detainees were forced to squat with their heads down. Then the convoying officers ordered them to rise, with their heads still down, and to run forward in the direction of their carriages. Detainees carried their heavy bags in their outstretched arms. Each detainee had to link arms with another. The convoying officers beat those who did not obey.

(b) The Government's account

91. On 16 February 2002 the first applicant was convoyed to Kazan railway station and put on a train to Ekaterinburg. He shared a compartment with five other detainees. On 17 February 2002 the train arrived at Ekaterinburg railway station. The first applicant did not complain to servicemen of the FSIN of the Sverdlovsk Region of the conditions of his transportation.

92. On 23 February 2002 the administration of remand prison IZ-66/1 provided the first applicant with a seventy-two hour ration. Then the first applicant was put on a train to Krasnoyarsk. He was placed in a big compartment together with eleven other detainees; the convoying officers did not use force against him. The journey lasted fifty-five hours and fifty-one minutes. On 26 February 2002 the first applicant arrived in Krasnoyarsk. He made no complaints concerning the conditions of his transportation.

93. On 4 March 2002 the administration of remand prison IZ-24/1 provided the first applicant with a twenty-four hour ration and sent him to Krasnoyarsk railway station. The first applicant was put on a train and

placed in a big compartment that he shared with nine other detainees. The convoying officers respected the detainees and did not use force against them. On 5 March 2002 the train arrived at Reshoty railway station, the Krasnoyarsk Region. The first applicant did not complain of the conditions of transportation or of ill-treatment to the convoying officers.

94. On 26 April 2002 at Reshoty railway station the first applicant was put on a train to Omsk. He shared a big compartment with ten other detainees. The carriage was properly equipped.

95. On 16 May 2002 in Omsk the first applicant was placed on a train to Ekaterinburg. He shared a compartment with ten other detainees. No force was used against him. He did not complain of the convoying officers's actions.

96. On 18 May 2002 in Ekaterinburg the first applicant was put on a train and placed in a compartment together with five other detainees. On 19 May 2002 the first applicant arrived in Kazan. He did not complain of the convoying officers' actions.

5. Conditions of detention in correctional facility UE-148/5

97. On 4 June 2002 the first applicant was transferred to correctional facility UE-148/5 in Sviyazhsk, the Tatarstan Republic.

(a) The first applicant's account

98. The correctional facility was overcrowded as 2,300 inmates were detained in premises built for 1,000 persons. In summer there was no hot water. Once a week inmates, who were divided into groups of 250, were allowed to wash in a bath-house equipped with only six working showers. Each group was limited to two hours in the bath-house.

99. The UE-148/5 infirmary lacked the medicines that the first applicant needed because of his asthma; the catering was very poor; and the food lacked vitamins.

100. The prison authorities occasionally lost the detainees' documents and did not allow the inmates to make copies of their respective case files, thus precluding them from complaining to the competent authorities.

101. On 6 December 2002 the acting head of UE-148/5 punished the first applicant by placing him in a disciplinary cell. The first applicant complained to the court of unlawful actions by an official. His complaint was dismissed by a final decision of 18 December 2003.

102. In March 2006 the first applicant learned that on 10 June 2002 he had been diagnosed with hepatitis C.

103. In his observations of 10 November 2006 the first applicant submitted that 1,700 detainees had been in UE-148/5 at that time.

(b) The Government's account

104. Detainees kept in UE-148/5, the strict-regime correctional facility, lived in residence halls. They could stay inside the halls during certain hours and spent the rest of their time in other premises, such as production units.

105. On 9 June 2002 the first applicant was allocated an individual sleeping place in the residential hall of brigade no. 7. His cell measured 90 sq.m and accommodated forty-four inmates, which allowed 2.04 sq.m of space per person.

106. On 7 April 2003 the first applicant was transferred to the residential hall of brigade no. 16 and allocated an individual sleeping place. His cell measured 35 sq.m and accommodated seventeen inmates, which allowed 2.06 sq.m of space per person.

107. On 5 September 2003 the first applicant was returned to the residence hall of brigade no. 7 and allocated an individual sleeping place. He shared a cell measuring 90 sq.m with forty-one inmates. Each inmate was allocated 2.14 sq.m of space.

108. On 15 April 2004 the first applicant was transferred to the residential hall of brigade no. 8 and allocated an individual sleeping place. His cell measured 90 sq.m and accommodated forty inmates. Each inmate was allocated 2.25 sq.m of space.

109. The sanitary facilities of the three residence halls were properly equipped as required by domestic law. In particular, the residence hall of brigade no. 8 comprised three dormitories, with 130 beds in total. It was equipped with a washroom measuring 25 sq.m, in which there were five showers, a mirror, a shelf, a urinal and a foot bath.

110. There was a properly equipped bath house in UE-148/5 where detainees could wash once a week in accordance with a schedule.

111. There were five wash basins with cold and hot water taps in every residence hall. While inside the residence halls, detainees could use the wash-basins and lavatory pans when necessary. The production units were equipped with sanitary facilities and wash basins.

112. The nutrition that detainees received in UE-148/5 corresponded to the norms established by law. UE-148/5 had been fully supplied with food while the first applicant was detained there. The UE-148/5 administration duly controlled the quality of the food.

113. While in UE-148/5 the first applicant was under constant medical supervision. He underwent regular medical check-ups and received the requisite treatment when necessary.

114. The first applicant was not detained with those suffering from tuberculosis and hepatitis. Detainees who had earlier suffered from tuberculosis and carriers of the hepatitis virus were under preventive monitoring, but were not contagious.

115. On 10 June 2002 the first applicant underwent blood tests that revealed that he had been a carrier of the hepatitis C virus. The first applicant showed no clinical signs of hepatitis.

4. Alleged lack of adequate medical assistance as regards the second applicant

(a) The second applicant's account

116. The second applicant suffered from chronic hepatitis B and C. According to the medical certificate issued by the Town Outpatient Polyclinic of Naberezhnye Chelny on 24 April 2003, the second applicant needed a specific diet, vitamins and hepatoprotective medicines. He was also recommended constant medical supervision.

117. On 13 October 2003 the second applicant received two NO-SPA tablets in the UE-148/2 infirmary.

118. On 15 January 2006 the second applicant was transferred to the prison hospital of the FSIN of Tatarstan. While being transported by rail he lost consciousness. The convoying officers had no medicines to help him to recover his senses. On the same date he was admitted to the prison hospital.

119. Between 15 January and 14 February 2006 the second applicant was kept in ward no. 2 of the prison hospital. The ward had only one small window measuring 20 x 20 cm and lacked fresh air and natural light. During that period the second applicant was treated with a glucose solution and Carsil, a hepatoptotective medicine.

120. While in the hospital, the second applicant complained in writing to a district prosecutor's office of a lack of medicines and qualified medical assistance in the prison hospital.

121. On 15 February 2006 the second applicant was transferred to ward no. 4, which had bigger windows. He learned that his inmates were HIV-positive.

122. The second applicant was treated with medicines which his brother had bought on the doctors' recommendation, including hepatoprotective medications Heptral and Essenciale. He was losing weight despite keeping to the prescribed diet.

123. By letter of 24 August 2006 the doctor of the prison hospital informed the second applicant's lawyer that some medicines administered to the second applicant had been purchased by his relatives. She also said that it could not be established whether the second applicant needed anti-viral therapy as he had been discharged from the prison hospital and noted, further, that such therapy was to be administered only after a complex examination that could not be carried out in penitentiary institutions.

(b) The Government's account

124. In 1995 the second applicant was registered at the Outpatient Polyclinic no. 4 of Naberezhnye Chelny, Tatarstan, as suffering from chronic viral hepatitis B and C with a high degree of replication activity.

125. While in detention, the second applicant regularly underwent medical check-ups and chest X-rays that revealed no clinical evidence of tuberculosis. There was no clinical evidence confirming that he suffered from cirrhosis.

126. On 21 February 2001 the second applicant received treatment for a respiratory viral infection. In August and November 2001 he was treated for neurodermatitis. He had no traumas or bodily injuries.

127. On 19 December 2005 the second applicant was placed in the UE-148/5 infirmary and diagnosed with advanced chronic viral hepatitis C. He was treated, in particular, with Heptral and Essenciale. On 13 January 2006 he was discharged from the UE-148/5 infirmary.

128. On 15 January 2006 the second applicant was admitted to the prison hospital of the FSIN of Tatarstan and diagnosed with active chronic viral hepatitis C with cholestatic syndrome and impaired cytolic response, and with moderate liver dysfunction. He received adequate treatment, but did not keep to the prescribed diet.

129. On 21 March 2006 the second applicant's state of health was described as stable.

130. On 29 March 2006 the second applicant was discharged from the hospital and transferred to UE-148/5.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION ON ACCOUNT OF THE FIRST APPLICANT'S CONDITIONS OF DETENTION AND TRANSPORTATION

131. The first applicant complained under Article 3 of the Convention of the material conditions of his pre-trial detention; his transportation and detention in various remand prisons during transportation; and of the conditions of his detention in UE-148/5. In particular, he submitted that the facilities in which he had been detained had been overcrowded. He also alleged that during the transportation he had been ill-treated by the convoying officers. The first applicant further vaguely complained that in UE-148/5 inmates had run the risk of infection with tuberculosis and hepatitis, that the infirmary had not had certain medicines and that the catering had been poor. Article 3 reads as follows:

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

A. The parties' submissions

132. The Government contested the first applicant's allegations. They noted that the first applicant had not brought his grievances to the attention of the prosecutors or courts. Therefore, in the Government's view, his complaints under Article 3 of the Convention should be dismissed for non-exhaustion of domestic remedies pursuant to Article 35 § 1 of the Convention.

133. Further, they insisted that the conditions of his pre-trial detention and transportation had been compatible with Article 3 of the Convention. As to the conditions of the detention in UE-148/5, the Government submitted that in a correctional facility inmates were kept not in cells, but in residence halls. They could stay in their dormitories in the residence hall at night and spent the day in other premises of the correctional facility. The statutory occupancy rate of 2 sq. m of space per person had been complied with in UE-148/5. Due to the lack of clinical evidence of hepatitis, there was no causal link between the first applicant's detention in the Russian penitentiaries and his illness. Furthermore, the applicant himself admitted that he had suffered from hepatitis C in 1998. The Government submitted that, according to the Rules on Internal Order in the Penitentiary, the copying of case materials was a service payable by a detainee. The first applicant had made no complaints to the UE-148/5 administration or other supervising bodies about a lack of access to his case file.

134. In support of their submissions the Government produced photographs of the dormitories of UE-148/5. The date on which the photographs had been taken was not communicated.

135. The Government submitted that on 22 March 2006 the first applicant had confirmed in writing that the situation in the penitentiary system had improved in comparison with that of 2001–2002 and that "at present conditions of detention are compatible with the law, I have no claims as regards the facts mentioned in the complaint". On 22 March 2006 the first applicant had stated in writing that he had no complaints about the UE-148/5 infirmary.

136. In sum, the Government asserted that there had been no breach of Article 3 of the Convention in respect of the first applicant.

137. The first applicant reiterated his complaints. He submitted that no effective remedies existed in relation to his complaint concerning the conditions of transportation. He emphasised that UE-148/5 had been overcrowded and that the number of showers in the bath-house had been insufficient given the number of detainees.

138. In support of his submission, the first applicant produced two written statements by his fellow inmates, Mr O.K. and Mr I.S. According to Mr O.K., who had been detained in UE-148/5 since February 2000, in 2002–2003 fifty-three inmates had been kept in a cell measuring 35 sq.m, and three inmates had contracted tuberculosis. According to Mr I.S., who had been detained in UE-148/5 since 1999, in June 2002 the applicants had been placed in section no. 1 of the residence hall of brigade no. 7. At that time more than five hundred detainees had been in that residence hall. Due to lack of beds, inmates had slept in shifts, but some of them had had to sleep on the floor or on stools. For a month the first applicant had slept on the floor; then he had slept in a bed in shifts with the second applicant.

B. The Court's assessment

1. Admissibility

(a) Exhaustion of domestic remedies

139. The Court reiterates that 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, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *Selmouni v. France* [GC], no. 25803/94, § 76, ECHR 1999-V, and *Mifsud v. France* (dec.), no. 57220/00, § 15, ECHR 2002-VIII). The Court further reiterates that the domestic remedies must be "effective" in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred (see *Kudła v. Poland* [GC], no. 30210/96, § 158, ECHR-XI).

140. The Court notes at the outset that the first applicant did not complain to any domestic authorities that he had been ill-treated in any manner by the convoying officers. Accordingly, the Government's objection in this respect must be supported. It follows that the part of the first applicant's complaint concerning the alleged ill-treatment by the convoying officers must be rejected for non-exhaustion of domestic remedies pursuant to Article 35 § 1 of the Convention.

141. The Court further points out that it has already established that no effective domestic remedy existed in the Russian legal system in relation to complaints concerning the general conditions of detention in remand prisons, in particular with regard to the structural problem of overcrowding (see *Benediktov v. Russia*, no. 106/02, § 29, 10 May 2007).

142. The Court also notes the Government's submission that the first applicant had not complained to prosecutors of poor conditions of his

transportation by rail. However, it finds that the Government have not shown that a complaint to a prosecutor could offer preventive or compensatory redress for conditions of transportation that are contrary to Article 3 of the Convention. Neither have they proved that a complaint to a court could have promptly improved the first applicant's situation.

143. Lastly, the Government submitted that the first applicant had not lodged any complaints concerning the conditions of his detention in correctional facility UE-148/5 before the prosecutors or courts. However, they did not specify what type of claim or complaint would have been an effective remedy in their view and did not provide any further information as to how this could have prevented the alleged violation or its continuation or provided the first applicant with adequate redress. In the absence of such evidence and having regard to the above-mentioned principles, the Court finds that the Government have not substantiated their claim that the remedies that the first applicant had allegedly failed to exhaust in relation to his complaints concerning the conditions of transportation by rail and the conditions of his detention in the correctional facility were effective (see, among other authorities, *Kranz v. Poland*, no. 6214/02, § 23, 17 February 2004, and *Skawinska v. Poland* (dec.), no. 42096/98, 4 March 2003).

144. Accordingly, the Court accepts the Government's objection concerning non-exhaustion of domestic remedies in respect of the first applicant's complaint of alleged ill-treatment by the convoying officers and dismisses their objections in respect of the complaints concerning conditions of the first applicant's detention in the remand prisons and correctional facility UE-148/5, as well as the conditions of his transportation.

(b) Compliance of the six-month rule

145. The Court reiterates that Article 35 § 1 of the Convention requires that the Court may only deal with a matter where it has been introduced within six months from the date of the final decision. Where it is clear from the outset however that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on, or prejudice to, the applicant (see *Dennis and Others v. the United Kingdom* (dec.), no. 76573/01, 2 July 2002).

146. The Court observes that the first applicant raised his complaint concerning the conditions of detention for the first time in his letter to the Court of 5 February 2003. As regards the complaints about the temporary detention centre and remand prison of Cheboksary, the first applicant's detention in these facilities ended on 18 December 2000 and 24 January 2002 respectively, which is more than six months prior to the date of introduction of the complaint (see, for example, *Nurmagomedov v. Russia* (dec.), no. 30138/02, 16 September 2004).

147. As to the complaints concerning the conditions of transportation and detention in the remand prisons during the period of transportation, the Court notes that the first applicant's transportation by rail ended on 4 June 2002. It follows that these complaints were introduced out of time and must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

148. The Court considers that it has competence to examine the first applicant's complaint concerning the conditions of his detention in correctional facility UE-148/5 as from 4 June 2002. It finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

149. 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, among other authorities, *Labita v. Italy* [GC], no 26772/95, § 119, ECHR 2000-IV). However, in order to fall under Article 3, ill-treatment must attain a minimum level of severity (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, § 162). The Court observes that, according to its constant case-law, measures depriving a person of his liberty may often involve an inevitable element of suffering or humiliation. Nevertheless, it is incumbent on the State to ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (see *Valašinas v. Lithuania*, no. 44558/98, §§ 101-02, ECHR 2001-VIII).

150. Turning to the circumstances of the present case, the Court notes that the parties have disputed certain aspects of the conditions of the first applicant's detention in UE-148/5. The main characteristic of the detention conditions, upon which the parties disagreed, was the number of inmates kept in the cells. It follows from the information submitted by the first applicant that his dormitory was overcrowded to the extent that he had no individual sleeping place during, at the very least, the first two months of his detention in the correctional facility. The Government disputed that assertion. They submitted that between 9 June 2002 and 7 April 2003 the first applicant shared a cell with forty-four inmates and was allocated 2.04 sq.m. of personal space.

151. In this connection the Court observes that Convention proceedings, as with the present application, do not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who

alleges something must prove that allegation) because in certain instances the respondent Government alone have access to information capable of corroborating or disproving such allegations. Failure on a Government's part to submit such information without a satisfactory explanation may give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations (see *Ahmet Özkan and Others v. Turkey*, no. 21689/93, § 426, 6 April 2004).

152. It was open to the Government to provide the Court with copies of registration logs showing names of inmates detained with the first applicant, which they failed to do. The Government did not assert that the photographs of the dormitories submitted to the Court (see paragraph 134 above) had been taken at the relevant time in 2002. In such circumstances the Court does not consider that the photographs can be regarded as refuting the first applicant's allegations. The first applicant, in his turn, provided two written statements by his inmates as corroborating evidence to his submissions. Given that the Government did not offer any convincing explanation for their failure to provide relevant information, the Court will examine the issue concerning the number of inmates in the cells on the basis of the first applicant's submissions.

153. The first applicant argued that the correctional facility designed for 1,000 detainees had accommodated in fact in different time-periods as many as 1,700 or 2,300 inmates (see paragraphs 98 and 103 above). Such a degree of overpopulation had adversely affected the detainees' quality of life; for instance, the bath-house's capacity had not been adapted to the higher number of inmates.

154. The Court reiterates that it has frequently found a violation of Article 3 of the Convention in a number of cases against Russia on account of a lack of personal space afforded to detainees while in the pre-trial detention (see *Khudoyorov v. Russia*, no. 6847/02, § 104 et seq., ECHR 2005-X (extracts); *Labzov v. Russia*, no. 62208/00, § 44 et seq., 16 June 2005; *Novoselov v. Russia*, no. 66460/01, § 41 et seq., 2 June 2005; *Mayzit v. Russia*, no. 63378/00, § 39 et seq., 20 January 2005; and *Kalashnikov v. Russia*, no. 47095/99, §§ 97 et seq., ECHR 2002-VI). It has also established that the problems arising from the conditions of the detention in Russian remand prisons were of a structural nature (see *Mamedova v. Russia*, no. 7064/05, § 57, 1 June 2006; and *Moiseyev v. Russia* (dec.), no. 62936/00, 9 December 2004).

155. A distinction must be drawn between the above mentioned cases concerning conditions of detention in remand prisons and the present application as the Court has not yet found that conditions of detention in correctional facilities could disclose a structural problem from the standpoint of Article 3 of the Convention (see, *a contrario*, *Benediktov v. Russia*, no. 106/02, § 29, 10 May 2007). For example, it has declared manifestly ill-founded a complaint concerning conditions of detention in a

correctional facility because the applicant enjoyed the wide freedom of movement in the facility's premises. However, in that case the applicant was allocated 3.5 sq. m. of personal space and did not allege that he had no individual bed (see *Nurmagomedov v. Russia* (dec.), no. 30138/02, 16 September 2004). Another complaint of conditions of detention in a correctional facility was dismissed as manifestly ill-founded because the applicant was at all times provided with an individual bunk bed (see *Solovyev v. Russia* (dec.), no. 76114/01, 27 September 2007).

156. Leaving aside whether a structural problem of overpopulation exists in Russian correctional facilities, the Court considers nevertheless that the first applicant's individual situation during the first months of his detention in UE-148/5 was deplorable.

157. The Court takes note of the first applicant's letter of 22 March 2006 submitted by the Government (see paragraph 135 above). It readily accepts that the conditions of detention in UE-148/5 had been improved by 2006. Nonetheless, such an improvement in itself does not suffice to justify the poor conditions of the first applicant's detention in 2002.

158. Having regard to the aforesaid, the Court finds that the prolonged lack of the minimum comfort, which a normal night-time sleep in satisfactory conditions gives, combined with the deficiency of private space was sufficient to cause the first applicant's distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. Accordingly, the conditions of his detention amounted to inhuman and degrading treatment.

159. It follows that there has been a violation of Article 3 of the Convention on account of the lack of an individual sleeping place allocated to the first applicant in correctional facility UE-148/5 in 2002. In view of this finding the Court sees no need to decide separately on the issue of the alleged breach of the Convention on account of other alleged deficiencies of conditions of detention in that facility in respect of the first applicant.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION ON ACCOUNT OF INADEQUATE MEDICAL ASSISTANCE AVAILABLE TO THE SECOND APPLICANT IN UE-148/5

160. The second applicant complained in substance under Article 3 of the Convention about a lack of adequate medical treatment in UE-148/5 for his hepatitis.

A. The parties' submissions

161. The Government submitted that the second applicant's allegations were unsubstantiated. UE-148/5 had been fully supplied with the necessary medicines. While there, the second applicant had been under constant

medical supervision. In sum, the Government claimed that the second applicant had received adequate medical assistance and thus his complaint was manifestly ill-founded. They further pleaded non-exhaustion on the ground that the second applicant had not complained of a lack of medical assistance to a prosecutor's office or a court.

162. The second applicant reiterated his complaint.

B. The Court's assessment

Admissibility

(a) Exhaustion of domestic remedies

163. The Court refers once again to the principles established in its case-law regarding the exhaustion of domestic remedies (see paragraph 139 above).

164. The Court observes that the Government merely noted that the second applicant had not lodged any complaints concerning the medical assistance available to him while in detention before domestic courts or prosecutors. They neither specified what type of claim or complaint would have been an effective remedy in their view, nor provided any further information as to how they could have prevented the alleged violation or its continuation or provided the second applicant with the adequate redress. In such circumstances, and having regard to the above-mentioned principles, the Court finds that, although the Government raised the plea of non-exhaustion, they did not substantiate their claim that the remedies the second applicant had allegedly failed to exhaust were effective (see, among other authorities, *Kranz v. Poland*, no. 6214/02, § 23, 17 February 2004, and *Skawinska v. Poland* (dec.), no. 42096/98, 4 March 2003).

165. For the above reasons, the Court finds that this part of the complaint cannot be rejected for non-exhaustion of domestic remedies.

(b) Well-foundedness of the complaint

166. Referring to the aforesaid general principles related to the prohibition of ill-treatment (see paragraph 149 above), the Court further reiterates that, although Article 3 cannot be interpreted as laying down a general obligation to release a detainee on health grounds safe for exceptional cases (see *Papon v. France (no. 1)* (dec.), no. 64666/01, ECHR 2001-VI, and *Priebke v. Italy* (dec.), no. 48799/99, 5 April 2001), the lack of appropriate medical treatment in prison may in itself raise an issue under Article 3, even if the applicant's state of health does not require his immediate release. The State must ensure that given the practical demands of imprisonment, the health and well-being of a detainee are adequately

secured by, among other things, providing him with the requisite medical assistance (see *Kudła v. Poland* [GC], no. 30210/96, §§ 93-94, ECHR 2000-XI; see also *Hurtado v. Switzerland*, judgment of 28 January 1994, Series A no. 280-A, opinion of the Commission, pp. 15-16, § 79).

167. Turning to the second applicant's complaint concerning a lack of necessary medicines in the UE-148/5 infirmary and in the prison hospital, the Court reiterates that unavailability of necessary medicines may raise an issue under Article 3 if it has negative effects on the applicant's state of health or causes suffering of a certain intensity (see *Mirilashvili v. Russia* (dec.) no. 6293/04, 10 July 2007).

168. The Court points out that the second applicant received a certain range of treatment. In particular, he was administered hepatoprotective medicines which his brother had procured for him. Accordingly, the second applicant cannot claim to have been affected by the shortage of medicines in the hospital.

169. The Court further notes that, while the second applicant disputed the adequacy of his treatment as a whole, he did not provide a medical opinion confirming his point of view. The Court considers that it does not follow from the letter of the prison hospital doctor that the second applicant's state of health necessitated any specific treatment (see paragraph 123 above). The mere fact that a complex examination could not be carried out in the penitentiary institutions cannot be regarded as proof of an overall deficiency in the medical assistance available to the second applicant as it has not been shown that such an examination was indispensable in his particular situation. In the circumstances of the present case the Court considers that the second applicant's state of health was not adversely affected by lack of certain medicines in the prison infirmary to the extent to cause him suffering.

170. Having examined all the materials in its possession, the Court finds no basis on which to conclude that the medical assistance provided to the second applicant for his hepatitis while he was serving his sentence was inadequate.

171. 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.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION ON ACCOUNT OF CONDITIONS OF THE SECOND APPLICANT'S DETENTION IN THE PRISON HOSPITAL

A. The parties' submissions

172. In his observations of 10 November 2006 the second applicant vaguely complained for the first time that the convoying officers had not

provided him with adequate medical assistance when he had lost consciousness on 15 January 2006, that the material conditions of his detention in ward no. 2 of the prison hospital had been poor and that he had shared ward no. 4 of that hospital with HIV-positive inmates. He relied on Article 3 of the Convention.

173. The Government did not comment on the second applicant's allegations.

B. The Court's assessment

Admissibility

174. As to the second applicant's complaints concerning the conditions of his detention in the prison hospital, the Court observes that he was kept in ward no. 2 of that hospital between 15 January and 14 February 2006. On 15 February 2006 the second applicant was transferred to ward no. 4. According to the Government, the second applicant was discharged from the prison hospital on 29 March 2006. The Court considers that the conditions of detention in the same ward are to be regarded as a continuing situation and reiterates that in such a case the six-month period runs from the cessation of the situation (see *Novinskiy v. Russia*, cited above, and *B. and D. v. the United Kingdom*, no. 9303/81, Commission decision of 13 October 1986, Decisions and Reports (DR) 49, p. 44). It notes that the second applicant's detention in wards nos. 2 and 4 ended on 14 February and 29 March 2006 respectively. Therefore, the six-month time-period in relation to the complaints concerning the conditions of detention in those wards started running on the above dates. The Court points out that the second applicant complained of his detention in the prison hospital for the first time in his observations of 10 November 2006, having failed to comply with the six-month rule.

175. Turning to the complaint of ineffective medical assistance administered to the second applicant by the convoying officers on 15 January 2006, the Court observes that such an incident, due to its instantaneous character, could not give rise to a continuing situation of a violation of the Convention (see, *mutatis mutandis*, *Bernadotte v. Sweden* (dec.), no. 69688/01, 3 June 2004). The Court notes that it does not transpire from the materials at its disposal that the second applicant complained about that particular incident to the domestic authorities. Assuming that there were no effective remedies available, the Court considers that the six-month period started running on 15 January 2006, while the complaint was raised only on 10 November 2006, that is, more than six months later.

176. The Court finds therefore that this part of the second applicant's complaint is time-barred and must be dismissed pursuant to Article 35 § 1 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

177. The applicants complained under Article 6 § 1 that their right to a fair trial had been infringed because self-incriminating statements made in their lawyer's absence had been used against them at the trial. They further complained, under Article 6 § 3 (d), that they could not cross-examine the prosecution or defence witnesses at the trial.

178. Article 6 of the Convention, in so far as relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law. ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ..."

A. The parties' submissions

1. The Government

179. The Government contested the applicants' allegations and submitted that on 8 and 9 December 2000 the applicants had been questioned as suspects and had denied their guilt. They had made no self-incriminating statements.

180. They further submitted that hearings in the applicants' criminal case had been repeatedly postponed due to the absence of the five victims. The trial court had taken all requisite measures to ensure the victims' attendance. The victims, who had resided in Naberezhnye Chelny, Tatarstan, had refused to appear in the courtroom in Cheboksary, the Republic of Chuvashiya, as they had feared for their safety. Despite the defence's objections, the trial court had excused the victims' absence and read out their pre-trial statements.

181. The trial court had summoned Mr K., who had failed to appear at the hearing. His pre-trial statement had been read out at Mr Sh.'s request. Mr L. and Mr Yu.I. had been summoned to the hearing but failed to attend it. Their pre-trial statements had been read out as the defence had made no objections.

182. The applicants' request to summon employees of the shop and the police officers had been dismissed because the trial court had had no information about those persons or their whereabouts. Moreover, the court had noted that in October 2001 those persons could hardly have

remembered the events of 6 December 2000. Mr P. and Mr M.A. had been summoned to the hearing at the second applicant's request, but failed to attend it. The applicants had complained about the absence of the above-mentioned witnesses in court in their respective appeals. The appeal court had found that the applicants' guilt had been proven by other evidence and emphasised that the trial court had taken all requisite measures to ensure the victims' and witnesses' presence at the hearings.

183. In sum, the Government submitted that the applicants' requests to summon defence witnesses had been granted on the same conditions as the requests to summon the prosecution witnesses and thus the requirements of Article 6 §§ 1 and 3 (d) of the Convention were met.

2. The applicants

184. The applicants contested the Government's arguments. In particular, they submitted that the second applicant's testimony had been read out at the trial. They further insisted that the defence had objected to the reading out of the statements of Mr K. and Mr L. The applicants provided affidavits by Mr P. and Mr M.A. confirming that the two witnesses had never received summonses to attend the trial hearing.

B. The Court's assessment

1. Admissibility

185. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) Alleged self-incrimination

186. The Court observes that nothing in the materials at its disposal indicates that the first applicant had made any self-incriminating statement that was later used against him. It is not persuaded that the second applicant's pre-trial statement referred to in the judgment of 8 November 2001 (see paragraph 64 above) contributed in any manner to the establishment of his guilt.

187. It follows that there has been no violation of Article 6 of the Convention in this respect.

(b) Witnesses

188. As the guarantees of paragraph 3 (d) of Article 6 are specific aspects of the right to a fair trial set forth in paragraph 1 of this Article, the Court will consider the complaint concerning the failure to examine prosecution and defence witnesses at the trial hearing under the two provisions taken together (see *Asch v. Austria*, judgment of 26 April 1991, Series A no. 203, p. 10, § 25).

i. Prosecution witnesses

α. General principles

189. The Court reiterates at the outset that the admissibility of evidence is primarily a matter for regulation by national law and that as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling on whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II, § 67, and *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-III, § 50).

190. All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence. As a general rule, the accused must be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statement or at a later stage (see *Van Mechelen and Others v. the Netherlands*, cited above, § 51, and *Lüdi v. Switzerland*, judgment of 15 June 1992, Series A no. 238, § 49).

191. In appropriate cases the principles of fair trial require that the interests of the defence are balanced against those of witnesses or victims called upon to testify, in particular where life, liberty or security of person are at stake, or interests coming generally within the ambit of Article 8 of the Convention (see *Doorson v. the Netherlands*, cited above, § 70).

192. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (ibid., § 72, and *P.S. v. Germany*, no. 33900/96, § 23, 20 December 2001).

193. Where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or have examined, whether during the investigation

or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 (see *Van Mechelen and Others v. the Netherlands*, cited above, § 55, and *Windisch v. Austria*, judgment of 27 September 1990, Series A no. 186, § 31).

ß. Victims

194. The Court notes that the applicants' conviction for robbery with violence was based, *inter alia*, on statements given by Mr D.E., Mr Yu.D., Mr R.I., Mr V.G. and Ms S.S. during the preliminary investigation. It considers that, although the five victims of the crime did not testify in court in person, they are to be regarded for the purposes of Article 6 § 3 (d) of the Convention as witnesses – a term to be given an autonomous interpretation – since their pre-trial statements were taken into account by the trial court (see *Delta v. France*, judgment of 19 December 1990, Series A no. 191-A, § 33).

195. The Court notes that organising criminal proceedings in such a way as to protect the interests of victims is a relevant consideration to be taken into account for the purposes of Article 6 of the Convention. However, the reasons given by the victims to justify their absence at the trial were rather vague and speculative and do not, therefore, appear relevant. In particular, Mr D.E., Mr Yu.D., Mr V.G. and Ms S.S. twice refused to attend the trial hearing because they feared for their safety. They failed to provide any explanation as to the nature of or grounds for those fears. Furthermore, Mr R.I. excused himself from the trial simply on grounds of his inability to be absent from work.

196. The Court cannot establish from the materials at its disposal how the trial court assessed the reasonableness of the personal fear of the victims *vis-à-vis* the applicants or counterbalanced Mr R.I.'s need to be at work against the applicants' defence rights. Accordingly, it is bound to conclude that the trial court took the reasons advanced by the victims for granted without considering whether they were genuine or not.

197. Having regard to the fact that the applicants had no opportunity to cross-examine the five victims of the crime at the pre-trial stage, the Court is not satisfied that the interest of the victims in ensuring their safety or securing their employment could justify limiting the rights of the applicants to a considerable extent (see, *mutatis mutandis*, *Krasniki v. the Czech Republic*, no. 51277/99, § 83, 28 February 2006).

198. In these circumstances, the applicants cannot be said to have received a fair trial.

199. There has thus been a violation of Article 6 § 3 (d) in conjunction with Article 6 § 1 of the Convention in respect of both applicants on account of the victims' absence at the trial.

γ. Mr L. and Mr K.

200. The Court notes that Mr L. was a prosecution witness from whom the first applicant had allegedly borrowed the money found by the police (see paragraphs 12, 13 and 42 above) and that Mr K. was a prosecution witness who had seen two men in the flat in which the applicants had been arrested (see paragraph 44 above). It further notes that it was disputed between the parties whether the defence had objected to Mr L.'s pre-trial statements being read out at the hearing of 26 October 2001. If the first applicant had indeed failed to raise an objection, such a failure could be considered as a waiver of the right (see *Vozhigov v. Russia*, no. 5953/02, § 57, 26 April 2007). The Court reiterates that a waiver of the exercise of a right guaranteed by the Convention, in so far as such a waiver is permitted in domestic law, must be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance (see *Colozza v. Italy*, judgment of 12 February 1985, Series A no. 89, pp. 14-15, § 28; *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-...; and *Hermi v. Italy* [GC], no. 18114/02, § 73, ECHR 2006-...).

201. The Court notes that the first applicant requested that Mr L. be summoned to the hearing (see paragraph 42 above). The Government did not dispute the applicants' submissions that they had objected to the statements of the two witnesses being read out at the hearings held before 26 October 2001. The second applicant challenged the accuracy of the trial record that contained a note "No objections" at page 71, arguing that the court secretary had erred in failing to insert the objections to the witnesses' statements being read out (see paragraph 65 above). In such circumstances the Court finds that there was no unequivocal waiver of the first applicant's right to question Mr L.

202. Furthermore, the Court is not persuaded that the applicants did not object to Mr K.'s pre-trial statement being read out (see paragraph 45 above). It refers in this connection to the Government's submission that Mr Sh., the applicants' co-accused, had requested the trial court to read out Mr K.'s statement. However, the Court is not convinced that in such circumstances the applicants' right to cross-examine the witness was waived. In the Court's view, where several persons are brought to trial, the defence rights of each of them must be equally respected as interests of the co-accused may be in conflict and a testimony in favour of one of them could have adverse implications for another. Accordingly, the Court does not find that there was a clear and unequivocal waiver of the applicants' right to cross-examine Mr K.

203. The Court notes that the domestic authorities made no particular effort to bring Mr L. and Mr K. before the trial court. The Government have put forward no convincing argument explaining the absence of Mr L. The Court considers that Mr L.'s testimony at the hearing would have been crucial for the establishment of the facts of the case as it could have

supported or refuted the first applicant's account of events given that the witness's pre-trial statement had been corrected and its initial sense was not unambiguous (see paragraph 42 above). Neither does it appear that the trial court was particularly diligent in securing Mr K.'s attendance of the hearing despite the fact that he could have clarified in the courtroom whether the two men who he had seen in Mr R.'s flat had been the applicants or other persons (see paragraph 44 above).

204. The Court therefore finds that there has been a breach of the applicants' rights under Article 6 § 3 (d) in conjunction with Article 6 § 1 of the Convention on account of the trial court's failure to secure Mr L. and Mr K.'s presence at the hearing.

ii. Defence witnesses

α. General principles

205. The Court once again reiterates the general principles on admissibility of evidence (see paragraph 189 above). Further, it emphasises that Article 6 § 3 (d) of the Convention does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to hear a particular witness (see *Laukkanen and Manninen v. Finland*, no. 50230/99, § 35, 3 February 2004). Article 6 § 3 (d) does not require the attendance and examination of every witness on the accused's behalf: its essential aim, as indicated by the words "under the same conditions", is a full "equality of arms" in the matter (see *Bricmont v. Belgium*, judgment of 7 July 1989, Series A no. 158, § 89 and *Vidal v. Belgium*, judgment of 22 April 1992, Series A no. 235-B, § 33). The Court reiterates that the principle of equality of arms implies that the applicant must be "afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent" (see *Bulut v. Austria*, judgment of 22 February 1996, *Reports of Judgments and Decisions* 1996-II, § 47). The concept of "equality of arms" does not, however, exhaust the content of paragraph 3 (d) of Article 6, nor that of paragraph 1, of which this phrase represents one application among many others. The task of the Court is to ascertain whether the proceedings at issue, considered as a whole, were fair as required by paragraph 1 (see, among other authorities, *Delta v. France*, judgment of 19 December 1990, Series A no. 191, p. 15, § 35, and *Vidal v. Belgium*, judgment of 22 April 1992, Series A no. 235-B, § 33).

ß. Mr I.P. and Mr M.A.

206. The Court recalls that Mr I.P. and Mr M.A. were witnesses on the second applicant's behalf from whom he had allegedly borrowed the money (see paragraph 12 above). It notes that it was disputed between the parties

whether the trial court had summoned Mr I.P. and Mr M.A. or not. The Government submitted that the trial court had granted the second applicant's request to summon Mr I.P. and Mr M.A. However, they failed to produce copies of summonses addressed to those individuals. Mr I.P. and Mr M.A. stated in their affidavits made in the presence of a notary that they had not received any summonses. The Court notes that the Government had an opportunity to comment on the affidavits but made no use of it. Accordingly, the Court finds that the second applicant substantiated his allegations by material evidence while the Government did not.

207. The Court observes that, should the trial court have considered it unnecessary to summon Mr I.P. and Mr M.A., it could have dismissed the second applicant's requests to summon the two witnesses on his behalf. However, the trial court formally granted such requests and thus agreed that the statements of Mr I.P. and Mr M.A. could have been relevant. The Court therefore considers that the trial court was under an obligation to take effective measures to ensure the witnesses' presence at the hearing by way of, at the very least, issuing summonses. Having failed to do so, the trial court did not comply with its duty to ensure the presence of witnesses on the second applicant's behalf on the same conditions as that of the prosecution witnesses and thus breached the "equality of arms" principle.

208. It follows that there has been a breach of Article 6 § 3 (d) in conjunction with Article 6 § 1 of the Convention on account of the failure to summon Mr I.P. and Mr M.A.

γ. Police officers and shop assistants

209. The Court observes that in the present case the identities of the police officers and the shop assistants who had allegedly seen the applicants on the night of the crime were not established. The Court further notes that the trial court found that those witnesses' testimonies had not been crucial for the establishment of the applicants' respective alibis (see paragraphs 51 and 52 above). In such circumstances, and considering inevitable difficulties in identifying those persons and establishing their whereabouts that the trial court would have faced if agreed to summon them, the Court finds that the refusal to search for the unidentified witnesses and to summon them did not restrict the applicants' defence rights to an impermissible extent.

210. It follows that there has been no violation of Article 6 § 3 (d) in conjunction with Article 6 § 1 of the Convention in this respect.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

211. The applicants raised a number of other complaints alleging a breach of their Convention rights. In particular, they complained under Article 6 § 1 of the Convention that the proceedings against them had been excessively long; that the stipendiary judge, the lay judges and the court's

secretary had been partial; and that the trial court had relied on inadmissible evidence and erred in its assessment of the evidence. They further complained of the refusal to initiate supervisory-review proceedings in their case. Under Article 6 § 2 of the Convention, they complained that the trial court had accused them of forgery when commenting on the origin of the correction in Mr L.'s statement. The first applicant complained that Mr T. had not attended the hearing immediately upon the defence's request and that Mr. G. and Mr Tr. had not appeared before the trial court at all. The first applicant also complained that his legal-aid lawyer was incompetent. The second applicant complained that the trial court had relied upon his co-accused's testimony given in court. In his letter of 10 July 2003 the second applicant complained under Article 6 of the Convention that his lawyer had not been present at the appeal hearing. In their letter of 23 February 2004 the applicants complained under Article 5 § 1 of the Convention about the length of their pre-trial detention and about the fact that their arrest and the extension of their detention had been ordered by the prosecutor.

212. Having regard to all the material in its possession, and as far as it is within its competence, the Court finds that the applicants' submissions disclose no appearance of violations 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.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

213. 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. Pecuniary damage

214. The first applicant claimed 140,000 Russian roubles (RUB) and the second applicant claimed RUB 100,000 in respect of pecuniary damage that they had sustained as a result of the search and the seizure of their money. Further, the first applicant claimed RUB 252,000 and the second applicant claimed RUB 216,000 as loss of earnings that they would have received if they had not been detained. The first applicant claimed RUB 10,000 in compensation for medicines seized by the prison authorities. The second applicant claimed RUB 19,776 in compensation for expenses incurred in buying medicines.

215. The Government contested these claims. They stated that the reasonableness of the national authorities' actions on charging a person with a criminal offence was not subject to review within the framework of the proceedings before the Court. Furthermore, the Government noted that the applicants' claims had not been confirmed by any official documents.

216. The Court first notes that the applicants raised no complaints concerning the allegedly unlawful seizure of the money found in Mr R.'s flat. Accordingly, it does not discern any causal link between the violation of Article 6 of the Convention found and the pecuniary damage alleged; it therefore rejects this claim. Further, the Court cannot speculate as to what the outcome of the criminal proceedings against the applicants might have been if the violation of the Convention had not occurred (see, among other authorities, *Popov v. Russia*, no. 26853/04, § 260, 13 July 2006; *Schmautzer v. Austria*, judgment of 23 October 1995, Series A no. 328-A, § 44; and *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, § 85). Therefore, the Court finds it inappropriate to award the applicants compensation for pecuniary damage for loss of earnings. Lastly, the Court finds no causal link between the violation of Article 6 of the Convention and the amounts spent on medicines; it therefore rejects this claim.

B. Non-pecuniary damage

217. Each applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage sustained as a result of the violations of their Convention rights.

218. The Government contested the applicants' claim and considered it unsubstantiated and excessive. In the Government's view, the finding of a violation would constitute sufficient just satisfaction in the present case.

219. Inasmuch as the applicants' claim relates to the finding of violations of Article 6 § 3 (d) in conjunction with Article 6 § 1, the Court reiterates that when an applicant has been convicted despite a potential infringement of his rights as guaranteed by Article 6 of the Convention, he should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be trial *de novo* or the reopening of the proceedings, if requested (see *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005-IV; and *Popov v. Russia*, no. 26853/04, § 263, 13 July 2006). The Court notes, in this connection, that Article 413 of the Code of Criminal Procedure provides that criminal proceedings may be reopened if the Court finds a violation of the Convention.

220. The Court finds in the present case that it is reasonable to assume that the applicants suffered distress and frustration caused by the unfairness

of the criminal proceedings against them. Moreover, it has found a violation of Article 3 in respect of the first applicant who was subjected to inhuman and degrading treatment. Deciding on an equitable basis, the Court awards the first applicant EUR 8,000 and the second applicant EUR 5,000 for non-pecuniary damage, plus any tax that may be chargeable to these amounts.

C. Costs and expenses

221. As the applicant did not claim costs and expenses, the Court makes no award under this head.

D. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the first applicant's complaint concerning the conditions of his detention in UE-148/5, as well as the complaints concerning the applicants' self-incriminating statements and the lack of possibility to cross-examine the prosecution and defence witnesses at the trial admissible, and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 3 of the Convention in respect of the first applicant's conditions of detention in UE-148/5;

3. *Holds* that there has been no violation of Article 6 § 1 of the Convention in respect of the alleged self-incrimination in respect of both applicants;

4. *Holds* that there has been a violation of Article 6 § 3 (d) in conjunction with Article 6 § 1 of the Convention in that the domestic courts failed to ensure the presence at the hearing of the five victims of the crime;

5. *Holds* that there has been a violation of Article 6 § 3 (d) in conjunction with Article 6 § 1 of the Convention in that the domestic courts failed to ensure the presence at the hearing of Mr L. and Mr K., the prosecution witnesses;

6. *Holds* that there has been a violation of Article 6 § 3 (d) in conjunction with Article 6 § 1 of the Convention in that the domestic courts failed to summon Mr I.P. and Mr M.A., witnesses for the second applicant;

7. *Holds* that there has been no violation of Article 6 § 3 (d) in conjunction with Article 6 § 1 of the Convention in that the domestic courts failed to summon the police officers and shop assistants, witnesses for the second applicant;

8. *Holds*
(a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the first applicant EUR 8,000 (eight thousand euros) and the second applicant EUR 5,000 (five thousand euros), in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement, plus any tax that may be chargeable to these amounts;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

9. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 25 September 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Christos Rozakis
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following opinion is annexed to this judgment:
(a) concurring opinion of Judge Spielmann.

C.L.R.
S.N.

CONCURRING OPINION OF JUDGE SPIELMANN

1. I agree in all respects with the Court's conclusions as to the violation of Article 6 § 3 (d) taken together with Article 6 § 1 of the Convention.

2. I would, however, have liked the reasoning set out in paragraph 219 of the judgment, on account of its importance, to have been included in the operative provisions as well.

3. I believe, for the reasons set out in my concurring opinion, joined by my colleague Judge Malinverni, appended to the *Vladimir Romanov v. Russia* judgment (24 July 2008, no. 41461/02), that where, as in the present case, the respondent State has equipped itself with a review procedure, it is the Court's duty not only to note the existence of such a procedure, as it does in paragraph 219 of the judgment, but also to urge the authorities to make use of it, provided, of course, that the applicant so wishes.

However, this is not legally possible unless such an exhortation appears in the operative provisions of the judgment.