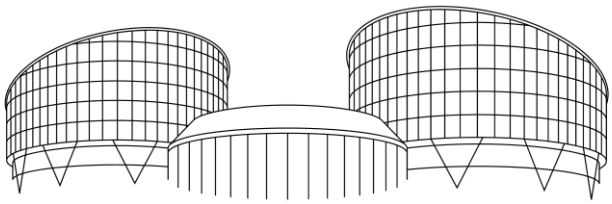

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF POKHLEBIN v. UKRAINE

(Application no. 35581/06)

JUDGMENT

STRASBOURG

20 May 2010

FINAL

20/08/2010

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

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

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

Peer Lorenzen, *President,*
Renate Jaeger,
Karel Jungwiert,
Rait Maruste,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges,*
Mykhaylo Buromenskiy, ad hoc *judge,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 27 April 2010,

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

PROCEDURE

1. The case originated in an application (no. 35581/06) 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 Dmitriy Viktorovich Pokhlebin ("the applicant"), on 13 August 2006.

2. The applicant was represented by his mother, Ms R. Ldokova. The Ukrainian Government ("the Government") were represented by their Agent, Mr Y. Zaytsev.

3. The applicant alleged, in particular, that the conditions of his detention had been unsatisfactory and that he had not been provided with appropriate medical treatment during his detention.

4. On 6 April 2009 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1970 and lives in Simferopol.

A. Criminal proceedings against the applicant and related issues

6. On 24 June 2004 the applicant was arrested on suspicion of drug trafficking. He was initially placed in a cell of the Kyivskyy District Police Department of Simferopol and subsequently moved to the Simferopol Pre-Trial Detention Centre (the "Simferopol SIZO").

7. On 24 December 2004 in view of his poor health the applicant was released from custody under a written obligation not to abscond.

8. On 12 November 2005 the applicant, with two accomplices, picked a quarrel with and then beat up Mr. A and his son, who were walking by in the street. During the scuffle the applicant took a jacket, money, a mobile phone and a bicycle which belonged to the victims.

9. On 16 November 2005 the applicant was arrested for that crime.

10. On 19 May 2006 the Kyivskyy District Court of Simferopol found the applicant guilty of the above crimes and sentenced him to six years' imprisonment with confiscation of property. The judgment was based on a number of witness statements, expert opinions, documentary and material evidence. The applicant appealed.

11. On 25 July 2006 the Court of Appeal of the Autonomous Republic of Crimea dismissed the applicant's appeal and upheld the judgment of the first-instance court of 19 May 2006. The applicant appealed in cassation.

12. On 13 February 2007 the Supreme Court rejected the applicant's cassation appeal and upheld the decisions of the lower courts.

13. On 3 October 2007 the Hola Prystan Town Court, having regard to the applicant's poor health and its further deterioration, granted him early release from prison. On 18 December 2007 that decision came into effect.

14. On 21 December 2007 the applicant was released.

15. Subsequently, the applicant's part of the flat, which is owned jointly by the applicant and his mother, was attached in the course of enforcement of the confiscation order.

16. According to the applicant, for an unspecified period of time he was not paid an invalidity allowance to which he was entitled.

B. Physical conditions of detention in the Simferopol ITT

1. The applicant's submissions on the facts

17. Between 16 November 2005 and 20 July 2006 the applicant was detained in the Simferopol Temporary Detention Centre (the "Simferopol ITT"). The cell in which the applicant was held measured 21 sq. m. It was equipped with six bunks while the number of detainees ranged from eight to fourteen persons including the applicant. The cell was dim and badly ventilated because there was only a small window equipped with metal bars.

During that period the applicant was never offered outdoor exercise; showers were unavailable.

18. By letter of 22 December 2005, the Simferopol Prosecutor's Office, replying to the applicant's complaint, informed him that the Simferopol ITT was built in 1977 and did not include a yard for daily exercise outside the cell, nor did it have a bathroom or shower cabin. He further noted that the Simferopol SIZO refused to accept detainees with tuberculosis.

2. The Government's submissions on the facts

19. According to the Government, in the Simferopol ITT the applicant was initially held with the other three detainees in a cell measuring 10 sq. m. Subsequently, he was held with other five detainees in a cell measuring 14 sq. m.

20. The cells were equipped with a sufficient number of bunks, and sanitary units were available there. The ventilation and lighting systems were operating properly. A shower cabin was installed in the Simferopol ITT and the detainees could wash themselves weekly.

C. Medical issues

21. According to the applicant, he contracted tuberculosis in June 2004 when he was being held in a cell of the Kyivskyy District Police Department of Simferopol.

22. In November 2004, in the course of the applicant's pre-trial detention, a medical commission issued a report confirming that he suffered from Aids (since 1997), bronchial tuberculosis (since 2004), chronic hepatitis, and candidiasis. The commission further concluded that the medical treatment provided to the applicant in the detention facility had been ineffective. For this reason the preventive measure in the applicant's respect was replaced with a non-custodial one and on 24 December 2004 the applicant was released.

23. In February 2005 the applicant underwent a medical examination following which he was designated as Category 2 (medium-level) disabled on account of his illnesses.

24. During the applicant's detention in the Simferopol ITT (between 16 November 2005 and 20 July 2006) the applicant was provided with medical treatment for his illnesses by the medical staff of that facility.

25. The Government, referring to the relevant report of the regional police department, submitted that in the Simferopol ITT the applicant was always provided with anti-Aids and anti-tuberculosis pills. Each time the applicant requested it an ambulance arrived and the necessary injections were administered. According to the applicant, he did not undergo any medical examination for his tuberculosis; the anti-Aids medicine was

administered irregularly and without proper documentation and control; nor were the other illnesses treated properly.

26. From February 2006 the applicant started to complain of numbness in the legs.

27. On 20 July 2006 the applicant was transferred from the Simferopol ITT to the Simferopol SIZO where he continued to undergo medical treatment.

28. On 11 August 2006 the applicant was moved to the hospital at the Daryivka no. 10 Prison where he was provided with medical assistance till 7 September 2006. By the end of that period the applicant was still suffering from tuberculosis, which at that time had affected his left lung, and all the other above-mentioned illnesses. In addition, he had been diagnosed with toxic polyneuropathy and other less serious illnesses. The medical staff therefore concluded that the strategy of the applicant's subsequent therapy had to be reviewed.

29. Between 7 September 2006 and 30 January 2007 the applicant was held in the Simferopol SIZO, the Sofiyivka no. 45 Prison, and the Dnipropetrovsk Pre-Trial Detention Centre where the medical staff continued providing treatment to the applicant in respect of his multiple illnesses.

30. On 30 January 2007, following a further deterioration of the applicant's health, he was returned to the hospital at the Daryivka no. 10 Prison where he was held till 14 March 2007. Following his arrival the applicant was diagnosed with all the above-mentioned illnesses, and additionally with spinal tuberculosis, acute maxillary sinusitis and chronic periodontitis. At the end of the applicant's detention in that facility all the illnesses remained and the applicant was also diagnosed with weight loss.

31. Between 14 March and 21 December 2007 the applicant was held in the hospital at the Hola Prystan no. 7 Prison, where he was provided with specific anti-tuberculosis and anti-Aids treatment. In that period the spinal tuberculosis progressed to the effect that the applicant became unable to walk on his own.

32. According to the Government, during that period the applicant refused the prescribed medical treatment. They referred to the report prepared by the medical staff on 23 May 2007 documenting that refusal by the applicant.

33. On 6 June 2007 the medical commission, having regard to the deterioration of the applicant's health, recommended that he be granted an early release.

34. Following his release on 21 December 2007, the applicant underwent medical examination and was designated as Category 1 (the highest level) disabled because of his illnesses.

35. It appears from the latest applicant's submissions that after his release he recovered the ability to walk on his own.

II. RELEVANT DOMESTIC LAW AND PRACTICE

36. The relevant domestic law and practice is summarised in the judgments of *Dvoynykh v. Ukraine* (no. 72277/01, §§ 28-37, 12 October 2006) and *Yakovenko v. Ukraine* (no. 15825/06, §§ 48-55, 25 October 2007).

III. RELEVANT INTERNATIONAL MATERIAL

37. The relevant international material is summarised in the judgment of *Melnik v. Ukraine* (no. 72286/01, § 47-53, 28 March 2006).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

38. The applicant complained that the physical conditions of his detention in the Simferopol ITT had been unsatisfactory. He further complained that he had not been provided with appropriate medical assistance during his detention. The applicant relied on Article 3 of the Convention, which reads as follows:

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

A. Physical conditions of detention in the Simferopol ITT

1. Admissibility

39. The Government maintained that the applicant had failed to exhaust domestic remedies, claiming that he should properly have raised that issue before the prosecutor's offices and the courts.

40. The applicant disagreed.

41. The Court notes that on a number of occasions it has rejected similar objections by respondent governments as to non-exhaustion of domestic remedies in respect of complaints about conditions of detention, when it found that such complaints pointed to problems of a structural nature in the domestic penitentiary system in question (see, for example, *Kalashnikov v. Russia* (dec.), no. 47095/99, 18 September 2001, and *Melnik*, cited above, §§ 69-71; *Koktysh v. Ukraine*, no. 43707/07, § 86, 10 December 2009).

42. In the present case the Court considers that the matters raised by the applicant under this head are also of a structural nature. It further notes that the applicant unsuccessfully complained to the prosecutor's office on account of conditions of his detention in the Simferopol ITT (see paragraph 18 above). In this situation the Court cannot reproach the applicant for having failed to make further use of the domestic remedies suggested by the Government and dismisses their objection to this effect.

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

2. Merits

a. The parties' submissions

44. The applicant, referring to his account of the facts, insisted that the physical conditions of his detention in the Simferopol ITT amounted to a violation of Article 3 of the Convention.

45. The Government maintained that the physical conditions of the applicant's detention in that facility had been adequate. They relied on their account of facts.

b. The Court's assessment

46. The Court observes that, according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Ireland v. the United Kingdom*, 18 January 1978, § 162, Series A no. 25). Furthermore, in considering whether treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it has adversely affected his or her personality in a manner incompatible with Article 3. Even the absence of such a purpose cannot conclusively rule out a finding of a violation of this provision (see *Peers v. Greece*, no. 28524/95, §§ 67-68 and 74, ECHR 2001-III, and *Valašinas v. Lithuania*, no. 44558/98, § 101, ECHR 2001-VIII).

47. The Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often

involve such an element. In accordance with this provision the State must 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 *Kalashnikov v. Russia*, no. 47095/99, § 95, ECHR 2002-VI).

48. In the present case the parties submitted various figures as to the personal space per detainee during the applicant's detention in the Simferopol ITT. The figures submitted by the applicant suggest that he had between 1.5 sq. m. and 2.6 sq. m. of personal space in that facility. The Government's figures suggest that the personal space per detainee in that facility ranged from 2.3 to 2.5 sq. m.

49. The Court does not need to resolve this disagreement between the parties. Having regard to its established case-law on this issue and the relevant standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (which are quoted, for example, in *Kalashnikov,* cited above, § 97, and *Melnik,* cited above, § 47), the Court considers that in any event the submissions of both parties show that the applicant was held in overcrowded conditions, which in itself discloses a serious issue under Article 3 of the Convention.

50. The Court further notes that the Government failed to rebut the applicant's assertions that he had never been offered any outdoor exercise in the Simferopol ITT and that at the relevant time there had been no specific shower facility there. Those assertions by the applicant are, however, supported by the official reply of 22 December 2005 from the prosecutor's office (see paragraph 18 above). Furthermore, the Government did not corroborate their submissions that the ventilation and lighting systems had been appropriate. In these circumstances the Court is inclined to give weight to the applicant's submissions on this matter (see *Ahmet Özkan and Others v. Turkey*, no. 21689/93, § 426, 6 April 2004). These findings are also corroborated by the general conclusions of the Parliamentary Commissioner for Human Rights concerning the physical conditions of detention in the penitentiary institutions in the Autonomous Republic of Crimea (referred to by the Court in *Koktysh*, cited above, §§ 41 and 42).

51. The Court therefore considers that the applicant's detention in overcrowded conditions was further aggravated by lack of access to fresh air, which was vitally important in view of his serious health problems, and by inadequate sanitary conditions, as well as by lack of appropriate lighting in the cell. The Court is particularly concerned that the applicant was held in such conditions for more than eight months.

52. The foregoing considerations are sufficient for the Court to conclude that the physical conditions of detention of the applicant in the

Simferopol ITT amounted to degrading treatment in breach of Article 3 of the Convention.

B. Medical treatment of the applicant during his detention

1. Admissibility

53. The Government contended that the applicant failed to make clear complaints of inappropriate medical treatment provided to him in the Simferopol SIZO and the Dnipropetrovsk Pre-Trial Detention Centre. They asserted therefore that the Court had to refrain from examining the appropriateness of medication in those facilities. They further maintained that those issues had not been properly raised before the prosecutor's officers and the courts.

54. The applicant disagreed.

55. The Court admits that the applicant might not have always made clear references to the names of the detention facilities when making submissions under this head. However, it appears from his submissions that he was complaining not exclusively on account of inappropriate medication in the facilities which he expressly mentioned, but also on account of the overall inappropriateness of medication provided to him throughout his detention. Having regard to the applicant's submissions in whole, the Court is of the opinion that the applicant's complaint should be viewed as referring rather to the entire period of his detention. It therefore rejects the relevant objection of the Government.

56. As to the plea of non-exhaustion, the Court considers that this part of application refers to a problem of a structural nature and that the remedies in question would be of no assistance to the applicant (see, for example, *Koval v. Ukraine*, no. 65550/01, §§ 96 and 97, 19 October 2006). The Court holds therefore that the applicant complied with the rule of exhaustion of domestic remedies.

57. Considering the period of the applicant's detention, which ended with his release on 24 December 2004, the Court finds that the applicant's complaint has been lodged more than six months after the date of that release. It follows that the respective part of the application should be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

58. The Court further notes that the applicant's complaint referring to the period between 16 November 2005 and 21 December 2007 is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It also notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

a. The parties' submissions

59. The applicant submitted that he had not been properly treated for his serious illnesses during the period in question. In particular, there had been no perceptible treatment in the Simferopol ITT, the Daryivka no. 10 Prison, the Sofiyivka no. 45 Prison, and the Hola Prystan no. 7 Prison. In view of the constant and serious deterioration of his health, the applicant contended that the medical care had been manifestly insufficient and this amounted to ill-treatment prohibited by Article 3 of the Convention.

60. The Government maintained that the applicant received appropriate treatment during his detention. They further argued that the applicant himself was partly responsible for the aggravation of his illnesses, as at a certain point he refused to undergo prescribed therapy.

b. The Court's assessment

61. The Court notes that Article 3 imposes an obligation on the States to protect the physical well-being of persons deprived of their liberty. The Court accepts that the medical assistance available in prison hospitals may not always be of the same level as in the best medical institutions for the general public. Nevertheless, the State must ensure that the health and well-being of detainees are adequately secured by, among other things, providing them with the requisite medical assistance (see *Kudła v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI, and *Hurtado v. Switzerland*, 28 January 1994, Series A no. 280-A). Where the authorities decide to place and maintain in detention a person who is seriously ill, they should take special care to guarantee conditions which correspond to his special needs resulting from his disability (see *Price v. the United Kingdom*, no. 33394/96, § 30, ECHR 2001-VII, and *Farbtuhs v. Latvia*, no. 4672/02, § 56, 2 December 2004).

62. The mere fact that a detainee is seen by a doctor and prescribed a certain form of treatment cannot automatically lead to the conclusion that the medical assistance was adequate (see *Hummatov v. Azerbaijan*, nos. 9852/03 and 13413/04, § 116, 29 November 2007). The authorities must also ensure that a comprehensive record is kept concerning the detainee's state of health and the treatment he underwent while in detention (see, for example, *Khudobin v. Russia*, no. 59696/00, § 83, ECHR 2006-XII (extracts)), that the diagnoses and care are prompt and accurate (see *Hummatov*, cited above, § 115, and *Melnik*, cited above, §§ 104-106), and that where necessitated by the nature of a medical condition, supervision is regular and systematic and involves a comprehensive therapeutic strategy aimed at curing the detainee's illness or preventing its aggravation, rather than addressing it on a symptomatic basis (see *Hummatov*, cited above,

§§ 109, 114; *Sarban v. Moldova*, no. 3456/05, § 79, 4 October 2005; and *Popov v. Russia*, no. 26853/04, § 211, 13 July 2006). The authorities must also show that the necessary conditions were created for the prescribed treatment to be actually followed through (see *Hummatov*, cited above, § 116, and *Holomiov v. Moldova*, no. 30649/05, § 117, 7 November 2006).

63. In the present case the Court considers that the applicant's poor health, in particular that he was suffering from Aids, tuberculosis, chronic hepatitis and candidiasis, called for special medical care on a regular, systematic and comprehensive basis.

64. The Court accepts that certain medical treatment was provided to the applicant in the detention facilities and the prison hospitals. Nevertheless, the Court observes that with the lapse of time that the applicant spent in detention his health significantly deteriorated: he acquired a number of new conditions such as occasional leg numbness, toxic polyneuropathy, acute maxillary sinusitis, chronic periodontitis, and weight loss. Furthermore, the applicant's tuberculosis became so much worse that it affected his spine, following which the applicant – for a certain period of time – became unable to walk on his own.

65. While accepting that the applicant could be reproached for refusal to undergo medical treatment in May 2007, as contended by the Government, the Court cannot shift all the responsibility from the Government to the applicant by this mere fact. It notes that that refusal was at the later stage of the applicant's detention, when his spinal tuberculosis and all the other newly acquired conditions had already been diagnosed and when all the previous lingering therapeutic programmes failed to be effective.

66. The Court further notes that the applicant was granted early release because of the deterioration of his health, and that following his release he was designated as Category 1 disabled, which was the highest category under domestic rules.

67. Accordingly, having regard to the seriousness of the applicant's illnesses and also to the domestic law requirement providing that the prisoners suffering from tuberculosis should be held in specialised prison hospitals, the Court considers that the measures taken by the domestic authorities had not been sufficient.

68. In the light of the above considerations, the Court holds that the medical care dispensed to the applicant during his detention between 16 November 2005 and 21 December 2007 was inadequate and amounted to a violation of Article 3 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

69. The applicant complained that his detention in the Simferopol ITT had been in breach of Article 5 of the Convention since that facility was not

appropriate for a long-term detention of a person. He further complained under Article 6 of the Convention that the proceedings in his criminal case had been unfair. He also complained that his rights under the Convention had been violated by the enforcement of the confiscation order adopted in his criminal case. Lastly, the applicant complained that he was not paid invalidity allowance for a certain period of time.

70. Having considered the applicant's submissions in the light of all the material in its possession, the Court finds that, in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

71. It follows that this part of the application must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

72. 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

73. The applicant claimed 33,000 euros (EUR) in respect of pecuniary damage and EUR 50,000 in respect of non-pecuniary damage.

74. The Government submitted that these claims were unsubstantiated.

75. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, the Court has no doubt that the applicants must have sustained non-pecuniary damage as a result of the violations found. Making its assessment on an equitable basis, as required by Article 41 of the Convention, it awards the applicant EUR 7,000 in respect of non-pecuniary damage.

B. Costs and expenses

76. The applicant also claimed 9,031.37 Ukrainian hryvnias (UAH)[1] or EUR 1,000 for travel, postal, and other expenses incurred in the course of proceedings before the domestic authorities and the Court.

1. Around EUR 743 as of the date on which the claim was formulated.

77. The Government maintained that the applicant's claim had not been supported by appropriate evidence.

78. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 20 covering costs under this head.

C. Default interest

79. 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 complaints under Article 3 of the Convention concerning the physical conditions of the applicant's detention in the Simferopol ITT and the lack of appropriate medical treatment during his detention between 16 November 2005 and 21 December 2007 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 3 of the Convention on account of inadequate physical conditions of the applicant's detention in the Simferopol ITT;

3. *Holds* that there has been a violation of Article 3 of the Convention on account of inappropriate medical treatment during the applicant's detention between 16 November 2005 and 21 December 2007;

4. *Holds*

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

(i) EUR 7,000 (seven thousand euros) in respect of non-pecuniary damage;

(ii) EUR 20 (twenty euros) in respect of costs and expenses;

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

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 20 May 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Peer Lorenzen
Registrar	President