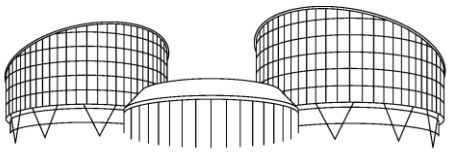

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF KUTEPOV v. RUSSIA

(Application no. 13182/04)

JUDGMENT

STRASBOURG

5 December 2013

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kutepov v. Russia,

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

Mark Villiger, *President*,
Angelika Nußberger,
Boštjan M. Zupančič,
Ann Power-Forde,
Helena Jäderblom,
Aleš Pejchal,
Dmitry Dedov, *judges*
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 12 November 2003,

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

PROCEDURE

1. The case originated in an application (no. 13182/04) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Valeriy Anatolyevich Kutepov ("the applicant"), on 21 January 2004.

2. The applicant, who had been granted legal aid, was represented by Mr R.V. Latypov, a lawyer practising in Moscow. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

3. On 14 April 2009 the complaints concerning Articles 3 and 6 § 3(c) of the Convention were communicated to the Government and the remainder of the application was declared inadmissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1968. He is currently serving a prison sentence.

A. Criminal proceedings against the applicant

5. On 2 November 2002 Klin police officers found the dismembered corpse of a man. They later found traces of blood which led them to the

applicant's mother's apartment, where they found a bloodstained axe and further traces of blood. Three men (the applicant, G. and O.) and two women were in the flat. G. told the police officers that the applicant had asked him to get rid of the dead body of a man who had been with the applicant to see him the day before. The applicant was arrested. On 3 November 2002 he was questioned in the presence of a duty lawyer.

6. On 6 November 2002 the Klin District Court ordered the applicant's pre-trial detention.

7. On 10 June 2003 the Moscow Regional Court convicted the applicant of murder, sentencing him to sixteen years' imprisonment. During the proceedings before the first-instance court the applicant was represented by a court-appointed lawyer.

8. The applicant appealed against the judgment. He complained, *inter alia*, that the court had refused to admit statements made by A. and K. as evidence or to summon Ka. who, according to the court's findings, had brought G. a note from the applicant in which he had asked G. to change his statement.

9. On 8 October 2003 the Supreme Court upheld the first-instance judgment. According to the applicant, he asked for the hearing to be adjourned and to be appointed a legal aid lawyer, but his request was rejected. With respect to his complaints, the court found that A. and K. had not been eyewitnesses and that their statements were irrelevant to the outcome of the case. As regards Ka., the court found that the circumstances of his appearance with the applicant's note had been confirmed during the trial by another witness, L.

10. On 28 July 2010 the Presidium of the Supreme Court re-examined the criminal case against the applicant by way of supervisory review, set aside the appeal decision of 8 October 2003, and ordered a new appeal hearing. It held that the applicant's right to defend himself through legal assistance had been violated at the appeal hearing.

11. On 7 September 2010 the Supreme Court upheld the judgment of 10 June 2002 in part and reduced the applicant's sentence to fourteen years' imprisonment. Both he and his lawyer were present at the hearing.

B. The applicant's state of health

12. The applicant was examined upon his arrival at the temporary detention unit on 3 November 2002. The examination revealed several bruises and scratches on his body. It was also noted that the applicant had not made any complaints about his state of health. He had however claimed that at the time of his arrest he had been brutally beaten by the police officers.

13. On 10 November 2002 the investigator ordered the applicant to undergo a forensic medical examination. The expert submitted his report on

12 November 2002. The only injuries found were a puncture wound and a bruise which could have been from an injection.

14. On 13 November 2002 the applicant was examined at Klin Hospital and his state of health was found to be compatible with detention.

15. On 15 November 2002 he was transferred to Volokolamsk Detention Facility and underwent a medical check-up upon arrival, which did not reveal any chronic illnesses or bodily injuries.

16. According to the applicant, he repeatedly complained of back pain and muscle loss in his left leg. According to the Government, he did not mention having any back problems.

17. On 19 March 2003 the applicant was examined by a neurologist from Klin Hospital and was diagnosed as having paresis and atrophy of the left leg. It was noted that an X-ray of his spine was required; however, it was not carried out.

18. On 3 April 2003 he was again examined by a neurologist, who recorded his complaints that his left leg was wasting away and diagnosed him as having paresis of the left leg and muscle hypotrophy of unclear origin.

19. On 27 October 2003 the applicant was transferred to correctional colony IK-11 in the Republic of Mordovia to serve his sentence.

20. Upon his arrival that day, he was examined and diagnosed as having paresis and muscle hypotrophy of the left leg.

21. On 4 November 2003 it was recorded in the applicant's medical file that he complained of back pain and muscle loss in his left leg. He was examined and the previous diagnosis regarding his leg was confirmed.

22. On 3 December 2003 the applicant was diagnosed as having myelopathy, namely chronic damage to the spinal cord, possibly on account of trauma. An X-ray was again recommended, but was not conducted as the equipment was broken.

23. On 11 December 2003 the same diagnosis was confirmed and the applicant was allowed to use a walking stick.

24. On 11 February 2004 the applicant was examined by a psychiatrist and diagnosed as having traumatic encephalopathy.

25. On 13 October 2004 he was examined by a neuropathologist and the diagnosis of 3 December 2003 was confirmed. He was prescribed vitamins B1, B3, B6, B12, ATP (Adenosine triphosphate) and Neostigmine, a drug used to improve muscle tone.

26. The applicant's health continued to deteriorate, which he made the subject of numerous complaints to various bodies, including the prosecutor's office. Between 2006 and 2008 he made 116 complaints. The applicant continued to be periodically examined by psychiatrists and neuropathologists. In 2006 a neurologist recommended that he avoid any physical activity.

27. Between 2008 and 2009 the applicant was placed in a punishment cell on several occasions for breaking various prison rules, such as smoking and wearing the wrong clothes. On 7 February and 19 February 2008 he was punished for sleeping on the floor of his cell when according to the prison's daily timetable, he should not have been asleep. He was detained in the punishment cell for twelve and thirteen days respectively. According to the applicant, he did not receive any medical treatment for his condition during these periods and he was not allowed to use a walking stick. The Government did not refute this information.

28. On 16 January 2009 the head of the prison medical unit exempted the applicant from having to queue or take physical exercise. He was told to stay in bed, to avoid pressure on his spine and being subjected to cold temperatures.

29. According to the applicant, the first X-ray of his spine was performed on 22 June 2009. The Government did not refute this information.

30. On 17 December 2010 the applicant was sent for treatment at the Republic of Mordovia Central Hospital, where he was examined by a neuropathologist, a surgeon, a psychiatrist and a therapist. He remained there until 28 December 2010.

31. On 21 December 2010 the Republic of Mordovia prosecutor's office replied to one of the applicant's numerous complaints concerning the inadequacy of his medical treatment. The prosecutor found that the applicant had been receiving medical treatment appropriate for his condition. He had also been to hospital for treatment, where he had been examined by a neuropathologist on several occasions.

32. In September 2011 the applicant again asked to be sent to the Central Hospital for treatment as his health had not improved. He was transferred there on 14 October 2011 and was again examined by specialists. He was sent to a specialist clinic for a Magnetic Resonance Imaging (MRI) scan of his spine. The doctors allegedly told him that they did not know what was causing his poor health. The surgeon allegedly refused to conduct an X-ray of his pelvis, considering it unnecessary.

33. The applicant was sent for the MRI scan on 6 December 2011 and remained in hospital until 23 December 2011. The results of the scan concluded that the applicant was suffering from a spinal disc herniation, the effects of a sacral fracture with displacement of bone fragments, and signs of osteochondrosis of the lumbar spine.

34. According to the applicant, his condition did not improve.

II. RELEVANT DOMESTIC LAW

35. The relevant domestic law concerning the provision of medical assistance at detention facilities is set out in the Court's judgment in *Valeriy Samoylov v. Russia*, no. 57541/09, §§ 52-53, 24 January 2012.

III. RELEVANT INTERNATIONAL STANDARDS

36. In its General Comment No. 14, adopted at the Twenty-second Session on 11 August 2000 (contained in Document E/C.12/2000/4), concerning the right to the highest attainable standard of health, the Committee on Economic, Social and Cultural Rights stressed that the right to health is not to be understood as a right to be healthy:

> "9. The notion of "the highest attainable standard of health" in article 12.1 [of the International Covenant on Economic, Social and Cultural Rights] takes into account both the individual's biological and socio-economic preconditions and a State's available resources. There are a number of aspects which cannot be addressed solely within the relationship between States and individuals; in particular, good health cannot be ensured by a State, nor can States provide protection against every possible cause of human ill health. Thus, genetic factors, individual susceptibility to ill health and the adoption of unhealthy or risky lifestyles may play an important role with respect to an individual's health. Consequently, the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

37. The applicant complained that, while in detention, he had not been provided with the appropriate medical treatment for his condition. He 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."

38. The Government contested that argument.

A. Admissibility

39. The Government raised an objection of non-exhaustion of domestic remedies, alleging that the applicant had not lodged any complaints about his state of health to any of the relevant authorities.

40. The applicant maintained that he had lodged numerous complaints about his medical treatment to both the prosecutor's office and the prison administration.

41. The Court observes that the case file contains dozens of complaints made by the applicant addressed to numerous authorities, including the prosecutor's office, concerning the inadequacy of his medical treatment. Consequently, the Government's objection must be dismissed (see *Gurenko v. Russia*, no. 41828/10, § 78, 5 February 2013).

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

B. Merits

1. The parties' submissions

43. The applicant maintained that he had not received a timely diagnosis for his spinal cord injury. Despite having persistently complained of back pain since the time of his arrest, he had not been examined by a specialist until March 2003. The doctor had recommended an X-ray of his spine, but it had not been carried out, and as a result his spinal cord injury had not been diagnosed until 3 December 2003.

44. Since then he had not been receiving adequate treatment for his condition. Most of the time, his treatment had been limited to taking vitamins and ATP, which had not helped him. On the contrary, his health had continued to deteriorate. As a result of his spinal injury his legs had begun to fail him, at times making movement extremely difficult, and for the last four years he had had difficulties controlling his left arm. He had also asked to be released from detention until his condition improved.

45. The Government maintained that the applicant had had access to and received adequate treatment for his medical condition. He had been examined by doctors, including specialists, on numerous occasions. He had not received any medical care for his spine in pre-trial detention, as there had been no medical evidence to suggest that he had needed such treatment.

2. The Court's assessment

(a) General principles

46. The Court reiterates that Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see, for example, *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV).

Ill-treatment must, however, attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim (see *Ireland v. the United Kingdom*, 18 January 1978, § 162, Series A no. 25, and *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 219, 21 January 2011).

47. The State must ensure that a person is detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure of deprivation of liberty do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (see *Kudła v. Poland* [GC], no. 30210/96, §§ 92-94, ECHR 2000-XI, and *Popov v. Russia*, no. 26853/04, § 208, 13 July 2006). In most of the cases concerning the detention of persons who were ill, the Court has examined whether or not the applicant received adequate medical assistance in prison. The Court reiterates in this regard that even though Article 3 does not entitle a detainee to be released "on compassionate grounds", it has always interpreted the requirement to secure the health and well-being of detainees, among other things, as an obligation on the part of the State to provide detainees with the requisite medical assistance (see *Kudła*, cited above, § 94; *Kalashnikov v. Russia*, no. 47095/99, § 95, ECHR 2002-VI; and *Khudobin v. Russia*, no. 59696/00, § 96, ECHR 2006-XII).

48. The "adequacy" of medical assistance remains the most difficult element to determine. The Court requires that, in particular, authorities must ensure that diagnosis and care are prompt and accurate (see *Hummatov v. Azerbaijan*, nos. 9852/03 and 13413/04, § 115, 29 November 2007; *Gladkiy v. Russia*, no. 3242/03, § 84, 21 December 2010; and *Khatayev v. Russia*, no. 56994/09, § 85, 11 October 2011) and that, where necessitated by the nature of a medical condition, supervision is regular and systematic and involves a comprehensive therapeutic strategy aimed at adequately treating the detainee's health problems or preventing their aggravation (see *Hummatov*, cited above, §§ 109, 114; *Sarban v. Moldova*, no. 3456/05, § 79, 4 October 2005; and *Popov*, cited above, § 211).

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

50. Lastly, an unsubstantiated allegation of no, delayed or otherwise unsatisfactory medical care is normally insufficient to disclose an issue under Article 3 of the Convention. A credible complaint should normally include, among other things, sufficient reference to the medical condition in

question, the medical prescriptions that were sought, made or refused, and some evidence – for instance, expert reports – capable of disclosing serious failings in the applicant's medical care (see *Valeriy Samoylov v. Russia*, no. 57541/09, § 80, 24 January 2012).

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

51. The Court will focus on the main thrust of the applicant's complaints, which relates to the alleged failure of the domestic authorities since 2003 to promptly diagnose and adequately treat his myelopathy.

52. Regarding the promptness of his diagnosis, the Court first notes that it is disputed between the parties at what point the applicant first complained of back pain. It is however clear from the evidence in the case file that on 19 March 2003 a neurologist requested an X-ray of the applicant's spine, which was not carried out. Had it been conducted, the applicant's myelopathy could have been diagnosed much earlier than in December 2003. In this context the Court reiterates the importance of a timely diagnosis (see *Melnik v. Ukraine*, no. 72286/01, § 104, 28 March 2006).

53. The Court, bearing in mind that the applicant's condition is a complex medical issue, must next determine whether the treatment the applicant was receiving was adequate.

54. The Court notes that the applicant's health was deteriorating ever since the beginning of his detention. In 2006 a doctor recommended that he avoid any physical activity. In 2009 he was exempted from having to queue or take physical exercise and was told to stay in bed, to avoid pressure on his spine and being subjected to cold temperatures. The applicant's medical condition is well documented and evidenced by medical opinion.

55. The Court is thus satisfied that by showing that his health was deteriorating, together with the documents submitted, the applicant succeeded in making a *prima facie* case that the treatment he was receiving was inadequate (compare *Valeriy Samoylov v. Russia*, cited above, § 92).

56. The Court considers that at this point it was upon the Government to submit evidence and comprehensive arguments showing that the treatment the applicant received was adequate and complied with Article 3 of the Convention (see *Janiashvili v. Georgia*, no. 35887/05, § 75, 27 November 2012; and, *mutatis mutandis*, *Rehbock v. Slovenia*, no. 29462/95, § 72, ECHR 2000-XII; and *Fedotov v. Russia*, no. 5140/02, § 60, 25 October 2005). Yet, they limited their observations to a succinct statement that the applicant's condition was satisfactory and that he had not complained about his state of health.

57. The Court notes that the applicant was being examined by doctors, including specialists, on a regular basis. Yet, the applicant's health had deteriorated over many years. Naturally, the State cannot be held responsible for the deterioration of someone's health *per se*. Health is in

many cases a state of well-being independent of any State activity, and indeed treatment of a particular medical condition may be beyond human capabilities. Good health cannot always be ensured by the State (see paragraph above). In Convention terms, detainees have a right to adequate medical treatment and not a right to be healthy. The Government however did not argue, even less adduced any evidence, that the applicant's condition could not be treated.

58. The Court also notes that on several occasions the applicant was detained in a punishment cell, where he did not receive any medical treatment (see paragraph 27 above). It reiterates that any violation of prison rules and discipline by a detainee, can in no circumstances warrant a refusal to provide medical assistance (see *Iorgov v. Bulgaria*, no. 40653/98, § 85, 11 March 2004).

59. Furthermore, one of the authorities' obligations arising from Article 3 of the Convention under the Court's case-law is, if rendered necessary by the circumstances of the case, to devise a comprehensive therapeutic strategy aimed at adequately treating a detainee's health problems or preventing their aggravation (see paragraph 48 above). That obligation is particularly pertinent in the present case where the authorities were faced with the health of an applicant which had deteriorated over many years, and which was the subject of numerous complaints. Yet the authorities failed to ensure that such a strategy was devised.

60. Between the diagnosis of his myelopathy in December 2003 and 2009, it seems that the applicant's treatment was limited to him taking vitamins and ATP, and avoiding physical activity. Given that the symptoms persisted, it is striking that a more detailed diagnosis was not undertaken for years. An X-ray of the applicant's spine does not appear to have been conducted until 2009. The MRI scan was not carried out until December 2011. The use of such diagnostic equipment was however important in establishing the extent of the spinal injury and for devising a strategy setting out how the applicant's deteriorating condition should be dealt with, and whether surgery should or should not be considered.

61. The Court is aware that after 2009 the treatment the applicant received improved, as he started undergoing specialist hospital treatment. Nevertheless, the Court is not convinced that, at least until 2009, the Russian authorities took all reasonably possible medical measures to improve the applicant's health or to at least decrease the number of serious, negative effects that he had to endure in his everyday life on account of his myelopathy (see *Gurenko v. Russia*, cited above, § 86 and *Janiashvili v. Georgia*, cited above, § 75).

62. The Court considers that, as a result of the inadequacy of his medical treatment, the applicant has been exposed to prolonged mental and physical suffering diminishing his human dignity and lasting for several years. The authorities' failure to provide the applicant with the medical care he needed

thus amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention.

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

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

64. Relying on Article 6 § 3 (c) of the Convention the applicant complained that no legal assistance had been provided to him during the appeal hearing of 8 October 2003.

65. In view of the decision of the Presidium of the Supreme Court of 28 July 2010 and the new appeal hearing of 7 September 2010, the Government maintained that the applicant could no longer be considered to be a victim of the violation alleged.

66. The Court reiterates that under Article 34 of the Convention it may receive applications from any person claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. It falls first to the national authorities to redress any alleged violation of the Convention. In this regard, the question whether an applicant can claim to be a victim of the violation alleged is relevant at all stages of the proceedings under the Convention (see, among other authorities, *Burdov v. Russia (no. 2)*, no. 33509/04, §§ 54-60 and 100, ECHR 2009). A decision or a measure favourable to an applicant is not, in principle, sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI).

67. The Court has held in relation to previous Russian cases that the reopening of proceedings by itself may not automatically be regarded as sufficient redress capable of depriving the applicant of his victim status. To ascertain whether or not the applicant retained his victim status, the Court will consider the proceedings as a whole, including the proceedings which followed their reopening (see *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 83, 2 November 2010).

68. Turning to the present case, the Court notes that the Presidium of the Supreme Court acknowledged a violation of the applicant's right to defend himself through legal assistance at the appeal hearing. A new appeal hearing was held a month and a half later, at which both the applicant and his lawyer were present.

69. Consequently, the Court considers that the Russian authorities acknowledged the violation of the applicant's right and afforded redress, in that the reopened proceedings complied with the applicant's right to a fair trial.

70. Thus, the Court concludes that the applicant is no longer a victim of the alleged violation and that this part of the application must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

71. 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."

72. The applicant claimed 200,000 euros (EUR) in respect of pecuniary damage and EUR 300,000 in respect of non-pecuniary damage.

73. The Government pointed out that the claim in respect of pecuniary damage had not been corroborated by any supporting documents. As to the claim for non-pecuniary damage, the Government were of the opinion that the finding of a violation would constitute sufficient just satisfaction.

74. The Court observes that the applicant's claim in respect of pecuniary damage was not corroborated by any documentary evidence; it therefore rejects this claim.

75. Nevertheless, the Court is of the view that the applicant must have experienced considerable anguish and distress which cannot be made good by the mere finding of a violation of the Convention. Having regard to the circumstances of the case as a whole and deciding on an equitable basis, the Court awards the applicant EUR 15,000 for non-pecuniary damage.

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the inadequacy of the applicant's medical treatment under Article 3 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 3 of the Convention;

3. *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, EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary

damage, to be converted into Russian roubles at the rate applicable at the date of settlement:

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

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

Done in English, and notified in writing on 5 December 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President