



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

FIFTH SECTION

**CASE OF TARARIYEVA v. RUSSIA**

*(Application no. 4353/03)*

JUDGMENT

STRASBOURG

14 December 2006

**FINAL**

*14/03/2007*

*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 Tarariyeva v. Russia,**

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

Mr P. LORENZEN, *President*,

Mrs S. BOTOUCHAROVA,

Mr K. JUNGWIERT,

Mr R. MARUSTE,

Mr A. KOVLER,

Mr J. BORREGO BORREGO,

Mrs R. JAEGER, *judges*,

and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 20 November 2006,

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

**PROCEDURE**

1. The case originated in an application (no. 4353/03) 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, Ms Nadezhda Dmitriyevna Tarariyeva ("the applicant"), on 4 December 2002.

2. The Russian Government ("the Government") were represented by Mr P. Laptev, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, a violation of Mr Tarariyev's right to life as a result of defective medical assistance and the absence of effective remedies in that connection. She also alleged a violation of the guarantee against inhuman and degrading treatment in respect of Mr Tarariyev.

4. By a decision of 11 October 2005, the Court declared the application partly admissible.

5. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1946 and lives in the Krasnodar Region. She is the mother of Mr Nikolay Ivanovich Tarariyev, a Russian national who was born in 1976 and died on 4 September 2002.

#### **A. Criminal proceedings against Mr Tarariyev**

##### *1. First conviction*

7. On 5 October 1996 Mr Tarariyev was involved in a fist fight in which he hit his former girlfriend's boyfriend. The injured man died three days later.

8. On 8 October 1996 criminal proceedings were instituted against Mr Tarariyev on suspicion of having caused grievous bodily injury that resulted in the victim's death, an offence under Article 108 § 2 of the RSFSR Criminal Code.

9. On 6 April 2000 Mr Tarariyev was convicted as charged and sentenced to six years' imprisonment in a correctional colony. On the same day he was taken into custody.

10. On 17 May 2000 the Krasnodar Regional Court upheld the conviction.

##### *2. Medical conditions in the Khadyzhensk colony*

11. Mr Tarariyev was sent to serve his sentence at correctional facility no. UO-68/9 in the town of Khadyzhensk in the Krasnodar Region ("the Khadyzhensk colony").

12. On 10 January 2001 Mr Tarariyev, who was in a serious condition, was taken into hospital for in-patient treatment. He was diagnosed with Morgagni-Adams-Stokes syndrome and an acute ulcer condition. Doctors prescribed strict bed rest and medicines. On 16 January 2001 Mr Tarariyev's state of health improved slightly.

13. On 22 January 2001 he was escorted to Treatment and Prevention Institution no. 5 (14) (*lechebno-profilakticheskoye uchrezhdenie no. 5 (14)* – "prison hospital") where he received treatment from 1 to 12 February 2001.

14. On 1 or 2 March 2001 Mr Tarariyev was brought back from the prison hospital to the Khadyzhensk colony with acute gastroduodenitis.

15. On 6 March 2001 he was examined and diagnosed with chronic gastroduodenitis. Certain medicines and vitamins were prescribed.

### *3. Quashing of the conviction and a new trial*

16. On 2 August 2001 the Presidium of the Krasnodar Regional Court quashed the judgments of 6 April and 17 May 2000 under the supervisory review procedure and remitted the case for a new trial.

17. On 22 September 2001 Mr Tarariyev was transferred to the Krasnodar detention centre (“the Krasnodar SIZO”).

18. On 20 February 2002 Mr Tarariyev fainted in the court room. The court ordered a medical examination of Mr Tarariyev by doctors from the Krasnodar SIZO and Afinskiy District Hospital. It put questions to them about Mr Tarariyev's illnesses and asked whether he needed in-patient treatment and whether he could remain in detention.

19. On 22 February 2002 Afinskiy District Hospital sent the following report to the court, signed by the deputy head doctor, the head of department and the doctor in charge:

“Afinskiy District Hospital no. 3 replies that Mr Tarariyev is undergoing treatment in the department of digestive illnesses in connection with a heart illness (myocarditis) and an acute condition of duodenal ulcer.

For treatment and differential diagnosis the patient is to remain in the department for no less than two weeks. [He] cannot be held in an investigations ward or detention facility.”

20. On 1 March 2002 Mr Tarariyev was discharged from the hospital to the Krasnodar SIZO. On 6 March 2002 he sought medical assistance and received out-patient treatment. He was diagnosed with stomach and duodenal ulcers, cardioneurosis and chronic gastroduodenitis.

21. On 19 April 2002 the Severskiy District Court pronounced a new conviction against Mr Tarariyev and sentenced him to six years' imprisonment in a correctional colony. On 10 July 2002 the Krasnodar Regional Court upheld the conviction on appeal.

### **B. Mr Tarariyev's death**

22. On 31 July 2002 Mr Tarariyev was transferred to the Khadyzhensk colony. According to the applicant, upon his arrival all his medicines were taken away from him and no medical assistance was provided.

#### *1. Worsening of Mr Tarariyev's condition and first surgical operation*

23. At 8.30 a.m. on 20 August 2002 Mr Tarariyev contacted the medical department of the colony, complaining of severe pain. He was diagnosed with a perforated duodenal ulcer and peritonitis. In view of his serious condition, a decision was made to transfer him to a civilian hospital.

24. At 1 p.m. on the same day surgery was performed on Mr Tarariyev at Apsheronk Central District Hospital (“Apsheronk Hospital” or “the civilian hospital”).

25. The applicant maintained that she had visited her son on 21 and 22 August and seen him shackled with handcuffs by his left hand to the hospital bed. In support of her allegation she produced a statement signed by a friend of hers, Ms T., who had also come to visit on 21 August. With the permission of the head of the resuscitation department, the applicant had stayed overnight on a spare bed. Her son had given her a signed form authorising her to collect his personal belongings.

26. On 21 and 22 August the applicant complained to the Apsheronk prosecutor, the Krasnodar Regional Prosecutor's Office, the President of the Krasnodar Regional Court and the deputy head of the Khadyzhensk colony about the handcuffing of her son and asked that he not be sent to the prison hospital in view of his condition.

### *2. Mr Tarariyev's discharge and transport to the prison hospital*

27. On 22 August 2002 Mr Tarariyev was diagnosed with a breakdown of sutures in the duodenum and duodenal fistula and peritonitis. He was discharged from Apsheronk Hospital and transported to the prison hospital, 120 km from Apsheronk.

28. According to the Government, Mr Tarariyev was transported in a “special car” accompanied by an experienced medical nurse who carried a set of necessary medical equipment on her. They produced a written statement by the nurse. She indicated that during the journey she had talked to Mr Tarariyev about his health and taken his blood pressure, which had been stable. The patient had had no complaints. The journey had lasted two hours.

29. According to the applicant, she had objected to her son's discharge and transfer but the head of the resuscitation department, Mr K., had told her that the transfer was mandatory because Mr Tarariyev was a convict. She had helped the medical staff to put the applicant, wrapped in a blanket, onto a wheel stretcher and then into the prison van (*avtozak*) onto a layer of padded cotton mattresses.

### *3. Mr Tarariyev's second surgical operation and death*

30. On 24 August 2002 further surgery on Mr Tarariyev's abdominal organs was performed in the prison hospital.

31. On 4 September 2002 the applicant came to see her son and learnt that he had died at 7.35 a.m. that day.

32. According to the death certificate of 5 September 2002, the autopsy established that the death had been caused by acute anaemia (blood loss)

provoked by massive gastrointestinal haemorrhaging. A perforated duodenal ulcer was noted as a concomitant illness.

### **C. Investigation into Mr Tarariyev's death**

33. On 7 September 2002 an assistant to the Teuchezh Inter-District Prosecutor informed the applicant of the decision not to initiate criminal proceedings in connection with Mr Tarariyev's death.

34. On 8 February 2003 the Apsheronsk district prosecutor told the applicant that the medical specialists at the Khadyzhensk colony had done all they could to save Mr Tarariyev's life, as they had sent him to Apsheronsk Hospital, which possessed the necessary surgical equipment.

35. On 19 February 2003 the Apsheronsk district prosecutor issued a decision to initiate criminal investigation no. 366214 into the actions of the medical specialists at Apsheronsk Hospital. The Apsheronsk District Police Department was requested to carry out an inquiry under Article 118 § 2 of the Criminal Code (negligent infliction of a grievous bodily injury resulting from incompetent performance of professional duties).

36. Between 3 and 26 March 2003 the investigators interviewed Doctors Du., Da. and K. from Apsheronsk Hospital, the psychologist from the Khadyzhensk colony and Mr D., the surgeon from the prison hospital. Mr D. testified as follows:

“... on the day of arrival Mr Tarariyev was in a serious state, unfit for transport ... Conservative therapy was recommended ... In the night of 23 August 2002 he began to haemorrhage and we started discussing surgery ... On 4 September 2002 he had another bout of intestinal haemorrhaging from the ulcer defect ... [The hospital] has no facilities for blood transfusion because it has no contract with the blood-transfusion service. For that reason Mr Tarariyev received blood substitutes which could not stabilise haemodynamics adequately ...”

37. On 27 March 2003 a police investigator ordered a medical inquiry into the circumstances of Mr Tarariyev's treatment and death.

38. By a decision of 1 April 2003, the applicant was granted victim status in criminal case no. 366214.

39. On 29 April 2003 a panel of three medical specialists returned the following unanimous findings:

“...6. Given the duodenal ulcer complicated by perforation (defect of the wall of a hollow organ), the transfer of Mr Tarariyev from the [Khadyzhensk] colony to Apsheronsk Hospital for surgery was vital ...

4.5. The examination and treatment of Mr Tarariyev in Apsheronsk Hospital at the time of his arrival was timely as his condition required emergency surgery. Owing to a short and inadequate report on the operation at Apsheronsk Hospital (the state of the stomach and organs of the abdominal cavity is not described, there is no indication of the method of suturing the ulcer defect or disinfecting and draining the abdominal cavity), it is impossible to determine whether the surgical technique was correct. Two

days later a breakdown of the sutures applied to the ulcer defect was observed, which gives rise to doubts about the quality of ... the surgery performed ...

7.8. On 22 August 2002 the patient Tarariyev was unreasonably transferred to [the prison hospital] with the diagnosis 'Sutures breakdown in the duodenum. Duodenal fistula in formation, peritonitis'. The patient was in an extremely serious condition, not fit for transport and required further emergency surgery – further laparotomy, revision and sanation of organs of the abdominal cavity and removal of the duodenal fistula, which was not done by either the doctors at Apsheronk Hospital or the doctors at the [prison hospital]. His transportation to the [prison hospital] aggravated the patient's condition and delayed emergency medical assistance. For unspecified reasons the surgery in the [prison hospital] was performed too late, two days after [the patient's] arrival ...

9. The experts' panel considers that there is no causal link between the actions of the doctors at the [Khadyzhensk] colony and Mr Tarariyev's death ... Defects in the medical assistance administered to Mr Tarariyev at Apsheronk Hospital and the [prison hospital] cumulatively resulted in the patient's death and there is a causal link between these events.”

40. On 21 May 2003 charges were brought under Article 109 § 2 of the Criminal Code (negligent manslaughter resulting from incompetent performance of professional duties) against the doctors from Apsheronk Hospital and the prison hospital.

41. On 3 June 2003 the case against the doctors from the prison hospital was severed and referred for investigation to the Krasnodar Regional Prosecutor.

42. On 4 June 2003 the applicant asked the Apsheronk district prosecutor to put additional questions to medical experts. In particular, she disagreed with the experts' findings in the part exculpating the medical staff at the Khadyzhensk colony. She submitted that they were to blame for the acute condition of her son's ulcer and its ultimate perforation because all medicines had been taken away from him and he had had to pick plantain and dandelions for self-treatment. The applicant did not receive any reply to her request.

43. On 6 June 2003 an investigator from the Apsheronk district prosecutor's office commissioned a supplementary medical expert examination, asking the experts to determine what medical instructions the doctors at Apsheronk Hospital had failed to comply with.

44. On 19 June 2003 the experts reported as follows:

“The experts' panel considers that the nurse O., the internist Kh., the anaesthetists-resuscitators K. and Shch. and the head of the resuscitation and anaesthesiology department K. did not violate any provisions of their Code of Practice ... when providing medical assistance to Mr Tarariyev.

The surgeon Du. did not arrange for a consultation by an internist before the surgery; the surgery was performed with technical defects that resulted in the breakdown of sutures; he did not call for the head of the surgery department in good time (on 22 August 2002, i.e. two days later); together with the head of department, he

decided to discharge the patient, who was unfit for transportation, to another institution; he filled in the medical documents approximately ... whereby he violated the rules governing provision of medical assistance in the field of general surgery and [certain provisions] of the Code of Practice of surgeons.

The head of the surgery department, Da., failed to monitor the surgeon Du.'s actions; he did not examine the patient Tarariyev daily; it was his duty to control the discharge of a seriously ill patient unfit for transport (the surgical methods were chosen incorrectly, further emergency surgery was required, a consultation with an expert in resuscitation and an internist was not organised before the discharge), which was in violation of [certain provisions] of the Code of Practice binding on heads of surgery departments.

Having regard to the above, the panel considers that the unjustified discharge of the seriously ill patient Tarariyev, who was unfit for transportation, from Apsheronk Hospital led to the belated provision of medical assistance, the development of complications, and death, for which the head of the surgery department is to be held liable pursuant to the Code of Practice."

45. By a decision of 21 June 2003 the senior assistant to the Adygheya Republic prosecutor refused to initiate criminal proceedings against the doctors from the prison hospital on the ground that the alleged offence had not been committed (*otsutstvie sobytiya prestupleniya*). On the basis of statements by Doctor D. and the deputy head of the therapy department, it was established that the medical records provided by Apsheronk Hospital had contained no information on the surgery performed or post-operative complications, such as the breakdown of sutures. Mr Tarariyev's condition had been further aggravated by the conditions of his transfer in a prison van. Further surgery had not been performed immediately because an examination of the patient had been required. According to the decision, the very length of the post-operative period showed that the further surgery had been performed correctly and that the ulcerative defect which had ultimately caused the death had not been a consequence of it. On 25 August 2003 the applicant received a copy of the decision.

46. On 10 July 2003 the investigator closed the criminal case against all the other doctors from Apsheronk Hospital and preferred criminal charges against the head of the surgery department Mr Da. On 22 August 2003 the case was set down for trial, and the applicant joined the proceedings as a civil party.

47. On 30 September 2003 the Apsheronk District Court of the Kransodar Region acquitted Mr Da. on the ground that no evidence produced by the prosecution established his guilt. In particular, the report of the medical experts of 29 April 2003 had only established a causal link between the actions of the doctors at both hospitals and Mr Tarariyev's death, but had not directly implicated Mr Da. The second report of 19 June 2003 could not be relied upon because the Code of Practice was regarded as inadmissible evidence (for unspecified reasons). On the basis of Mr K.'s testimony, the court found that Mr Da. could not reasonably have

foreseen the patient's death because Mr Tarariyev's condition at the time of his discharge “was improving” and “permitted his transport to [the prison hospital]”. The judgment was silent on the outcome of the applicant's civil claim.

48. Both the applicant and the prosecution appealed. The applicant claimed, in particular, that Mr Da. had sent her son to certain death because he had authorised his discharge in a serious condition and a journey of more than 100 km in a vehicle unfit for the transportation of patients. The court did not determine her civil claim against Mr Da. A request by the applicant for a ten-day adjournment on the ground that her lawyer was engaged in the regional court was refused. The prosecution challenged the court's decisions on admissibility and assessment of evidence.

49. On 10 December 2003 the Krasnodar Regional Court examined the appeals and upheld the acquittal, endorsing the arguments of the first-instance court.

50. On 5 November 2003 the senior assistant to the Adygheya Republic prosecutor reported to the applicant that an additional inquiry into the actions of the staff of the prison hospital had been carried out further to her complaint to the Prosecutor General's Office. It was found that Mr Tarariyev had been kept in intensive care and had received intensive infusion and antibacterial treatment in preparation for the surgery. Therefore, no negligence could be established.

51. On 27 January and 2 March 2004 the Prosecutor General's Office told the applicant that all inquiries had been carried out in a comprehensive and objective manner and there were no grounds to quash the decisions made.

#### **D. Relevant medical documents**

52. Medical in-patient record no. 53, opened for Mr Tarariyev on 1 February 2001 at the prison hospital states:

“Preliminary diagnosis: duodenal ulcer, recrudescence of chronic gastritis ...

12 February 2001: discharged to the colony after improvement. Recommendations have been made...”

53. A duplicate of an unnumbered out-patient record from the Khadyzhensk colony states:

“Arrived from the [Kransodar SIZO] without a medical record. 31 July 2002: healthy, no complaints. Stomach ulcer in the patient's medical history. Tuberculosis specialist: healthy. Internist: healthy.

20 August 2002, 8.30 a.m. ... Diagnosis: perforated duodenal ulcer. General peritonitis. Hypovolemic shock, 2nd degree. Needs urgent surgery. Medicines: ...”

54. Medical in-patient record no. 7377/1362, opened for Mr Tarariyev on 20 August 2002 at 11.30 a.m. at the surgery unit of Apsheronk Hospital states:

“... 20 August 2002, 1-2.35 p.m. Surgery: laparotomy. Suture ligation of ulcer. Drainage of the abdominal cavity ...

22 August 2002, 8 a.m.-2 p.m. Examination by the head of the department. The patient is in a serious condition due to the early post-surgery period and breakdown of sutures in the ulcer area ...

23 [*sic*] August 2002: discharged for transfer to a special hospital.”

55. Medical record no. 419, opened for Mr Tarariyev on 22 August 2002 at 5.30 p.m. in the surgery unit of the prison hospital states:

“... 24 August 2002, 3 a.m., doctor on duty. Urgent call to the resuscitation room... The patient is in a very serious condition ... haemorrhagic shock. Resuscitation measures taken. Treatment within the hospital capacity: there is an insufficient quantity of menadione or aminocaproic acid ...

24 August 2002, 7.35 a.m.-12.35 p.m. Surgery no. 225: further laparotomy ...

29 August 2002. The patient's state is stable, with a tendency to improve ...

4 September 2002, 5.50 a.m. Urgent call to the room. Intense chest pain ... At 7.35 a.m. death is confirmed.”

#### **E. The questioning of the witness Ms T.**

56. On 5 December 2005 the applicant complained to the Court that on 1 and 2 December 2005 the Regional Prosecutor's Office had formally questioned Ms T. about the events described in her statement (see paragraph 25 above). In the applicant's view, such conduct of the domestic authorities had clearly been intimidating for her witness.

57. On 19 December 2005 the Government submitted their observations on the merits. They claimed, in particular, that

“... the applicant's allegation that she visited Mr Tarariyev in the resuscitation unit of Apsheronk Central Hospital... and supposedly saw that he was handcuffed to the bed, does not correspond with the reality and misleads the Court. According to the Russian Federation Prosecutor General's Office ... repeated checks have established that neither the applicant nor other persons, except for medical staff and guards, had been admitted to see Mr Tarariyev... Thus, referring to the information of the Federal Service of Execution of Sentences and the Prosecutor General's Office, the Russian Federation authorities insist that during Mr Tarariyev's stay at Apsheronk Central Hospital for treatment he was not handcuffed.”

58. On 19 December 2005 the Court asked the Government whether Ms T. had been interviewed and, if so, what the purpose and legal basis of

that interview had been. The Government were also requested to produce copies of the interview records.

59. On 13 January 2006 the Government submitted their reply. They acknowledged that on 30 November and 1 December 2005, further to a request by the Government's Representative before the European Court dated 12 November 2005, Ms T. had been summoned to the Severskiy district prosecutor's office for the purpose of verifying the applicant's complaint to the Court. The Government claimed that Ms T. had not been "questioned" within the meaning of the domestic law but merely asked to "provide an explanation" in accordance with section 22 of the Public Prosecutors Act. No pressure had been exerted on Ms T. and the constitutional guarantee against self-incrimination had been explained to her. The Government claimed that there had been no hindrance of the applicant's right of individual petition under Article 34 of the Convention.

60. The Government produced copies of two printed statements signed by the deputy prosecutor of the Severskiy district and by Ms T. The statement of 30 November 2005 reads as follows:

"I have known Mrs Tarariyeva since 1993 because I then dated her son ... I know that Mrs Tarariyeva applied to the European Court and I know the subject matter of her application ... Mrs Tarariyeva did not ask me to confirm any facts which did not actually happen.

On 21 August 2002 I went to Apsheronk Hospital to see Mr Tarariyev at the request of his mother. He was in a separate room in the resuscitation department... There was a uniformed police officer with a submachine gun in the same room, and two police officers stood guard outside the room. We were let into the room in the presence of the head of department. Mr Tarariyev was in a serious condition... He could speak, but with great difficulty. His left hand was attached with handcuffs to the metal rail of the bed ... I remained in the room for five to fifteen minutes. Several drips were connected to Mr Tarariyev, to his right arm ... I went only once to Apsheronk Hospital and have not seen Mr Tarariyev since."

61. The statement of 1 December 2005 reads as follows:

"In reply to additional questions, I confirm that I visited Mr Tarariyev at Apsheronk Hospital on 21 August 2002 ... Mrs Tarariyeva and I had come to Apsheronk in the night of 20 August 2002 but they had not let us in because Mr Tarariyev had just undergone surgery ... I cannot say whether Mr Tarariyev was guarded by police. They might have been convoy officers; I do not know their insignia. All three of them wore green camouflage uniforms. The officer with a submachine gun, who was in Mr Tarariyev's room, sometimes sat on the bed or folding bed and sometimes got up and walked about. I do not remember the appearance of the officers who stood guard outside the room but I can describe the officer who was in the room ..."

## II. RELEVANT DOMESTIC LAW

### A. Civil Code

62. The general provisions on liability for damage read as follows:

#### **Article 1064. General grounds giving rise to liability for damage**

“1. Damage inflicted on the person or property of an individual... shall be reimbursed in full by the person who inflicted the damage ...

2. The person who inflicted the damage shall be liable for it unless he proves that the damage was inflicted through no fault of his own ...”

### B. Code of Criminal Procedure

63. If criminal proceedings are discontinued at the stage of the investigation, an aggrieved person who joined the proceedings as a civil party may lodge a separate civil claim unless the proceedings were discontinued on the ground that (a) the alleged offence had not been committed (*otsutstvie sobytiya prestupleniya*) or (b) the suspect had not been involved in its commission (Article 213 § 4 and Articles 24 § 1 (1) and 27 § 1 (1)).

64. If the defendant is acquitted by the trial court on the ground that (a) the alleged offence was not committed or (b) the defendant was not involved in its commission, the trial court will dismiss the civil claim. If the defendant is acquitted on the ground that one or more constituent elements of a criminal offence are missing (Article 24 § 1 (2)), the trial court will disallow the civil claim but it may be lodged again in civil proceedings (Article 306 § 2).

### C. Public Prosecutors Act

65. Section 22 provides that a public prosecutor may summon officials or private persons and ask them for explanations about violations of laws.

### D. Penitentiary Act

66. The Penitentiary Act (the Federal Law on Institutions and Authorities Executing Custodial Criminal Sentences, no. 5473-I of 21 July 1993) provides that handcuffs may be used on detainees with a view to putting an end to mass disorder or during the convoy of detainees whose

conduct gives reason to believe that they might escape or harm themselves or others (section 30 (2) and (4)).

### III. RELEVANT COUNCIL OF EUROPE DOCUMENTS

67. The relevant extracts from the 3rd General Report [CPT/Inf (93) 12] by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“the CPT”) read as follows:

#### **“a. Access to a doctor**

... 35. A prison's health care service should at least be able to provide regular out-patient consultations and emergency treatment (of course, in addition there may often be a hospital-type unit with beds). ... Further, prison doctors should be able to call upon the services of specialists. ...

Out-patient treatment should be supervised, as appropriate, by health care staff; in many cases it is not sufficient for the provision of follow-up care to depend upon the initiative being taken by the prisoner.

36. The direct support of a fully-equipped hospital service should be available, in either a civil or prison hospital. ...

37. Whenever prisoners need to be hospitalised or examined by a specialist in a hospital, they should be transported with the promptness and in the manner required by their state of health.”

#### **b. Equivalence of care**

38. A prison health care service should be able to provide medical treatment and nursing care ... in conditions comparable to those enjoyed by patients in the outside community. Provision in terms of medical, nursing and technical staff, as well as premises, installations and equipment, should be geared accordingly.

There should be appropriate supervision of the pharmacy and of the distribution of medicines. Further, the preparation of medicines should always be entrusted to qualified staff (pharmacist/nurse, etc.).

39. A medical file should be compiled for each patient, containing diagnostic information as well as an ongoing record of the patient's evolution and of any special examinations he has undergone. In the event of a transfer, the file should be forwarded to the doctors in the receiving establishment ...”

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLES 2 AND 13 OF THE CONVENTION

68. The applicant complained that her son, Mr Tarariyev, had died in custody as a result of inadequate and defective medical assistance and that those responsible had not been identified and punished. The Court will first examine this complaint from the standpoint of Article 2 of the Convention, the first sentence of which provides:

“Everyone's right to life shall be protected by law.”

#### **A. The Government's preliminary objection as to the non-exhaustion of domestic remedies**

69. In their submissions following the Court's decision as to admissibility of the application, the Government pointed out that the applicant had not challenged the prosecutor's decision of 21 June 2003 refusing to institute criminal proceedings against the medical staff at the prison hospital, before a court of general jurisdiction.

70. The Court reiterates that, in accordance with Rule 55 of the Rules of Court, any plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application (see, for example, *Prokopovich v. Russia*, no. 58255/00, § 29, 18 November 2004, with further references). The Government's submissions referred to the events that had occurred before the application was lodged with the Court and there had been no relevant legal developments thereafter. There are no exceptional circumstances which would have absolved the Government from the obligation to raise their preliminary objection before the Court's decision as to the admissibility of the application. Consequently, the Government are estopped from raising a preliminary objection of non-exhaustion of domestic remedies at the present stage of the proceedings.

#### **B. Submissions by the parties on the merits**

71. The Government claimed that there had been no violation of Mr Tarariyev's right to life. His death had not been a consequence of inadequate conditions of detention or medical assistance, but the outcome of an unpredictable development of the illness he had acquired prior to his placement in custody. The investigators and domestic courts had thoroughly examined the circumstances of Mr Tarariyev's death, assessed a substantial

body of evidence, commissioned a medical examination, interviewed witnesses and found no fault on the part of the medical staff or other persons. The Government further submitted that the applicant's civil claim for non-pecuniary damages had been dismissed because Mr Da. had been acquitted and because the Russian law of tort did not provide for liability without fault in such a situation.

72. The applicant maintained that the appalling conditions of her son's detention at the State penitentiary institutions, exacerbated by the lack of appropriate treatment, had led to a recrudescence of his ulcer on 14 August 2002, its perforation and other complications on 20 August and his death on 4 September. The direct cause of Mr Tarariyev's death had been blood loss caused by internal haemorrhaging. Both medical record no. 419 and Mr D.'s testimony indicated that the prison hospital did not possess a sufficient quantity of haemostatics and no investigation into that matter had been carried out. The applicant considered that the investigation had been neither comprehensive nor adequate. After her civil action in the criminal proceedings had been refused she had no prospects of obtaining redress in civil proceedings.

### **C. The Court's assessment**

#### *1. General principles applicable to the protection of the right to life*

73. The Court reiterates that the first sentence of Article 2, which ranks as one of the most fundamental provisions in the Convention and also enshrines one of the basic values of the democratic societies making up the Council of Europe, requires the State not only to refrain from the "intentional" taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see, for example, *Keenan v. the United Kingdom*, no. 27229/95, § 89, ECHR 2001-III). In the context of prisoners, the Court has already emphasised in previous cases that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them. It is incumbent on the State to account for any injuries suffered in custody, which obligation is particularly stringent where that individual dies (see, for example, *Keenan*, cited above, § 91, and *Salman v. Turkey* [GC], no. 21986/93, § 99, ECHR 2000-VII).

74. Those principles apply in the public-health sphere too. The positive obligations require States to make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable (see *Vo v. France* [GC], no. 53924/00, § 89, ECHR 2004-VIII; *Calvelli and Ciglio v. Italy* [GC],

no. 32967/96, § 49, ECHR 2002-I; and *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V). Furthermore, where a hospital is a public institution, the acts and omissions of its medical staff are capable of engaging the responsibility of the respondent State under the Convention (see *Glass v. the United Kingdom*, no. 61827/00, § 71, ECHR 2004-II).

75. Although the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently (see *Perez v. France* [GC], no. 47287/99, § 70, ECHR 2004-I), the Court has stated on a number of occasions that an effective judicial system, as required by Article 2, may, and under certain circumstances must, include recourse to the criminal law. However, if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence, the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged (see *Vo*, cited above, § 90; *Calvelli and Ciglio*, cited above, § 51; *Lazzarini and Ghiacci v. Italy* (dec.), no. 53749/00, 7 November 2002; and *Mastromatteo v. Italy* [GC], no. 37703/97, § 90, ECHR 2002-VIII).

## *2. Application of the general principles in the present case*

### **(a) Alleged failure of the Russian authorities to protect Mr Tarariyev's right to life**

#### *i. State responsibility*

76. The Court notes that since 6 April 2000 and until his death on 4 September 2002 Mr Tarariyev was in custody and, accordingly, under the control of the Russian authorities. It is not disputed that Mr Tarariyev suffered from various chronic illnesses, such as ulcer, gastritis and gastroduodenitis. The Government did not deny that the authorities had been well aware of those ailments (see, in particular, paragraphs 12-15, 19 and 20 above), which had required constant medical supervision and appropriate treatment. In these circumstances, the Court considers that the authorities should have kept an ongoing record of Mr Tarariyev's state of health and the treatment he underwent while in detention (see the CPT's General Report on the standards of health care in prisons, cited in paragraph 67 above).

*ii. Adequacy of medical care at the Khadyzhensk colony*

77. The applicant pointed out that, according to a duplicate of the medical record submitted for the medical expert report in 2003, Mr Tarariyev had been considered healthy and there was no mention of any medical examination or check-up. As no medicines had been available, he had had to pick plantain and dandelions for self-treatment.

78. Relying on the identically worded statements given in 2005 by the acting director of the Khadyzhensk colony and the head of its medical unit, the Government claimed that after his return from the prison hospital in March 2001, Mr Tarariyev had been given regular medical check-ups. The details of the treatment could not be provided. The information about check-ups had been entered into the original medical record that had remained in the Krasnodar detention centre and was no longer available, and also in the check-up registers that had been destroyed in 2005. For that reason, entering the same information in the duplicate medical record had been unnecessary.

79. The Court notes that when Mr Tarariyev arrived at the Khadyzhensk colony on 31 July 2002, he was not new to the establishment. He had previously stayed there in 2000-2001 and from there he had been taken to a prison hospital with an acute ulcer condition. As the medical record from the prison hospital indicated, on his discharge “recommendations [about his treatment] ha[d] been given” (see paragraph 52 above). It is not clear what these recommendations were, where they were recorded, and whether they were implemented following Mr Tarariyev's return to the Khadyzhensk colony by the colony officials responsible for the health and well-being of detainees.

80. In so far as the events in July and August 2002 are concerned, the Court does not need to determine whether or not Mr Tarariyev was given regular check-ups at the Khadyzhensk colony. The crucial element for its assessment of that period is the absence of any indication of a medical examination by a gastroenterologist after Mr Tarariyev's return to the colony and until the grave deterioration of his condition twenty days later. As noted above, the colony officials were fully aware of Mr Tarariyev's medical history of stomach ulcer and this was mentioned in the duplicate medical record (see paragraph 53 above). Lacking current and reliable information on his state of health – as his original medical record had either been left behind at the Krasnodar detention centre or mislaid at the colony –, the colony authorities did not arrange for his examination by a specialist, confining their observations to the mention that he was not infected with tuberculosis, considered himself healthy and made no complaints. The Court considers, however, that in case of a prisoner returning from hospital with a known history of medical ailments, the authorities are under an obligation to ensure appropriate follow-up care independent of the initiative being taken by the prisoner (see the CPT's General Report on the standards of health care in prisons, cited in paragraph 67 above). Although the

applicant's allegation that her son had to rely on plants for self-treatment cannot be verified, his medical record contains no evidence that he received any follow-up care until his ulcer became perforated on 20 August 2002. Accordingly, the Court finds that at the Khadyzhensk colony Mr Tarariyev was not adequately examined and did not receive medical care appropriate to his state of health.

*iii. Adequacy of medical care at Apsheronk Hospital*

81. On 20 August 2002 Mr Tarariyev underwent surgical intervention for a perforated ulcer at Apsheronk Hospital. The Court notes that a panel of three medical specialists unanimously formed the view that the quality of the surgery was at least open to doubt because of a subsequent breakdown of sutures. Furthermore, a summary and inadequate description of surgery in the medical records made more precise factual findings impossible (see point 4.5 of the report of 29 April 2003). A supplementary experts' report found fault with the practising surgeon, Mr Du., who had not arranged for a consultation by an internist before the surgery and had performed the operation with technical defects, and his supervisor, Mr Da., who had not checked the patient's condition (see the report of 19 June 2003, cited in paragraph 44 above). As the Government did not put forward any argument casting doubt on the findings of the domestic medical experts, the Court finds that the quality of surgical care administered to Mr Tarariyev at Apsheronk Hospital was inadequate.

82. The Court pays particular attention to the subsequent decisions taken by the doctors from Apsheronk Hospital. It appears from Mr Tarariyev's in-patient record that in the morning of 22 August 2002 the head of the department, Mr Da., examined him and established that he was "in a serious condition due to ... breakdown of sutures in the ulcer area" (see paragraph 54 above). The panel of medical experts later determined that the state of the patient had called for immediate further surgery (see point 7.8 of the report of 29 April 2003, and the report of 19 June 2003). However, no such surgery was arranged.

83. Instead, the surgeon and the head of the department took the decision to discharge Mr Tarariyev for transfer to the prison hospital. As the medical experts found, Mr Tarariyev had been "unfit for transport" and the decision to discharge him had been taken without appropriate consultation by specialists and had been "unreasonable" and "unjustified" (see the above-cited experts' reports). The Government did not produce any element contradicting those findings. The Court cannot, moreover, overlook the fact that the state hospital doctors provided their colleagues in the prison hospital with an incomplete medical record for Mr Tarariyev. The information crucial for the proper assessment of the patient's condition was missing: the record contained no mention of the surgery performed or the

post-operative complications, such as the breakdown of sutures (see paragraph 45 above).

84. The domestic medical experts found that the decision to discharge had been the main cause of aggravation of Mr Tarariyev's condition because it had led to "belated provision of medical assistance and the development of complications and death" (see the above-cited report of 19 June 2003). As these findings were not refuted by the Government, the Court considers that the medical care administered to Mr Tarariyev at Apsheronk Hospital was inadequate.

85. The fact that the criminal case against most of the doctors involved was closed at the stage of pre-trial investigation, whereas Mr Da. was acquitted by the domestic courts bound by the presumption of innocence, does not absolve the respondent State from its responsibility under the Convention for the acts and omissions in the treatment of Mr Tarariyev. In all cases before the Court, what is in issue is the international responsibility of the State (see *Lukanov v. Bulgaria*, judgment of 20 March 1997, *Reports of Judgments and Decisions* 1997-II, p.543, § 40, and *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, p. 25-26, § 34).

*iv. Adequacy of medical care at the prison hospital (Institution no. 5)*

86. Upon his discharge, Mr Tarariyev was transported to the prison hospital where he underwent further surgery on 24 August 2002. The medical experts established that the surgery had been performed "too late" (see point 7.8 of the above-cited report of 29 April 2003). It appears, however, that the absence of a reliable and complete medical record from Apsheronk Hospital complicated and delayed the assessment of the patient's condition. It is unclear why the prison hospital staff did not contact their colleagues from the state hospital in that situation of urgency. The experts' panel found that belated further surgery was one of the causes of Mr Tarariyev's death (see point 9 of the above-cited report of 29 April 2003).

87. A further element decisive for the assessment of the adequacy of medical care at the prison hospital is whether it possessed the necessary facilities to perform surgical interventions successfully and deal with post-operative complications. In the present case it appears that such facilities were conspicuously lacking. The surgeon testified to the investigators that the prison hospital had "no facilities for blood transfusion because it [had] no contract with the blood-transfusion service" (see paragraph 36 above). An entry in Mr Tarariyev's medical record from the prison hospital indicates that the available quantity of haemostatics – that is, blood-clotting agents – was insufficient (see paragraph 55 above). In the light of these facts the Court finds that the prison hospital was not sufficiently equipped for dispensing adequate medical care and that there was a causal link between these deficiencies and Mr Tarariyev's death.

*v. Summary of the Court's findings and conclusion*

88. In sum, the Court has made the following findings in respect of the applicant's contention that the Russian authorities failed in their duty to protect Mr Tarariyev's right to life.

For more than two years preceding his death Mr Tarariyev had been in detention and the custodial authorities had been fully aware of his health problems. There was no consistency in his medical records, most of which were either mislaid or incomplete. At the Khadyzhensk colony he was not properly examined and did not receive any medical treatment. Although he was promptly transferred to a state hospital, the surgery performed was defective. The doctors at Apsheronsk Hospital authorised his discharge to the prison hospital in full knowledge of the post-operative complications requiring immediate further surgery. They also withheld crucial details of Mr Tarariyev's surgery and developing complications. The prison hospital staff treated him as an ordinary post-operative patient rather than an emergency case with the consequence that surgery was performed too late. Furthermore, the prison hospital was not adequately equipped for dealing with massive blood loss.

The existence of a causal link between the defective medical assistance administered to Mr Tarariyev and his death has been confirmed by the domestic medical experts and not disputed by the respondent Government.

89. Accordingly, the Court finds that there has therefore been a violation of Article 2 of the Convention on account of the Russian authorities' failure to protect Mr Tarariyev's right to life.

**(b) Adequacy of the investigation**

90. The Court also has to examine whether the respondent Government discharged their obligation under Article 2 to put at the applicant's disposal an effective judicial system, enabling liability for the loss of life to be established and any appropriate redress to be obtained (see the general principles cited in paragraph 75 above).

*i. The criminal investigation*

91. The Court observes, firstly, that the competent prosecutors were particularly slow in instituting a criminal investigation into the circumstances that had led to Mr Tarariyev's death. The district prosecutor opened a criminal case only on 19 February 2003, that is, five months after Mr Tarariyev's death. It also appears that the scope of the case was originally limited to the acts of the Apsheronsk Hospital doctors and that it was only later extended to the medical staff at the prison hospital. It follows that the beginning of the investigation was belated.

92. Secondly, the Court is not satisfied that the investigation was comprehensive. Certain crucial circumstances were left outside the scope of

the official inquiries. As regards the actions of the Khadyzhensk colony's officers, the prosecutors found that they had arranged for Mr Tarariyev's transfer to a civilian hospital in a diligent manner, but the adequacy of medical assistance in the preceding period was never examined, despite the applicant's express request to that effect (see paragraph 42 above). The prosecutor's decision of 21 June 2003 – concerning the staff of the prison hospital – mentioned that Mr Tarariyev's state of health had deteriorated as a consequence of the conditions of his transfer in a prison van (see paragraph 45 above), but no attempts appear to have been made to identify those responsible for such conditions of transfer. The issue of responsibility for having discharged a seriously ill patient without appropriate medical documentation was not examined and that flagrant omission did not form part of the charges brought against the head of the surgery department Mr Da. Finally, the prosecutors did not consider why the prison hospital had had no capacity for blood transfusion and whether there had been a causal link between the absence of haemostatic medicines and Mr Tarariyev's death, notwithstanding the information contained in the death certificate and the surgeon's testimony to that effect.

93. Thirdly, the Court finds that the applicant's right to participate effectively in the investigation was not secured. She had been formally granted victim status in the criminal case against the doctors at the civilian hospital but not in the severed case against the staff of the prison hospital. The respondent Government did not deny that on 4 June 2003 the applicant had asked the prosecutor in writing to put additional questions to the medical experts concerning the alleged inadequacy of medical assistance at the Khadyzhensk colony. Her request remained unanswered, however. Furthermore, the decision of 21 June 2003 refusing the institution of criminal proceedings against the prison hospital staff was not served on the applicant until two months later, whereas the domestic law provides for immediate service.

94. Fourthly, the Court considers that the prosecution failed to prepare a solid evidentiary basis for the trial. The case against the head of the surgery department, Mr Da., collapsed in court because the Code of Practice regulating his professional duties had been excluded as inadmissible evidence with the consequence that the experts' report of 19 June 2003 based on that Code was rejected by the trial court. The judgment itself is silent as to why that piece of evidence was inadmissible and the Government did not clarify this matter. In any event, in the final reckoning, Mr Da. could no longer be held responsible for his failure to comply with the Code of Practice, whereas the prosecution's case was precisely that of “manslaughter resulting from incompetent performance of professional duties”.

95. Finally, the Court observes that the case against the prison hospital staff never went to trial, despite the medical experts' unanimous finding that

there had been a causal link between their failings and Mr Tarariyev's death (see point 9 of the report of 29 April 2003, cited above).

*ii. Civil claim for compensation*

96. As to whether the applicant was able to obtain compensation in civil proceedings, the Court notes that in Russian criminal law the possibility of lodging a civil claim for damages against the putative tortfeasor depends on the grounds on which the criminal proceedings were discontinued. A decision to discontinue proceedings on the ground that the alleged offence was not committed (*otsutstvie sobytiya prestupleniya*) legally bars access to a civil court on the basis of a claim for damages arising out of the same event (see paragraph 63 above). If, however, the defendant is acquitted because one or more elements of a criminal offence were missing, a civil claim can still be re-introduced in separate civil proceedings (see paragraph 64 above).

97. The Court observes firstly that, by operation of the above-cited legal provisions, the prosecutor's decision not to institute criminal proceedings against the medical staff of the prison hospital on the ground that no offence had been committed (see paragraph 45 above) debarred the applicant from suing the prison hospital staff for damages in a civil court.

98. The Court further notes that the head of the surgery department of Apsheeronsk Hospital, Mr Da., was acquitted on the ground that his acts had not been criminal because guilt had not been made out. The applicant's civil claim was disallowed but the domestic law permitted her to lodge it again in separate civil proceedings. She has not re-introduced it, evidently on the assumption that it would fail.

99. The Court recalls that it has already examined a complaint by an applicant that the prosecutors' decision not to bring criminal proceedings against the perpetrators had had the effect of denying him access to a court in respect of his civil claim for damages arising out of the same incident. Having regard to case-law authority to the effect that a civil court was not bound by the decision of the prosecuting authorities terminating a criminal investigation and to the fact that the applicant did not attempt to bring civil proceedings, the Court found no violation of the applicant's rights under Article 6 § 1 of the Convention (see *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, pp. 3291-92, §§ 107-13).

100. In the Court's view, the present case is different and the crucial distinction lies in the thrust of the applicant's complaint: in the *Assenov* case the applicant complained about a breach of his right of access to a court in that he would not be able to introduce a civil action for damages; in the present case the applicant contended that such an action could be introduced but had no chances of success. The Government's position echoed the applicant's contention. They submitted, in essence, that the criminal court

had reasonably dismissed the applicant's civil claim following Mr Da.'s acquittal and that there had existed no other grounds of liability permitting the applicant to recover compensation for non-pecuniary damage. It follows that a civil action against Mr Da. would have failed.

101. Finally, it appears plausible that the applicant could have sued the civilian and/or prison hospital as legal entities, relying on general grounds of liability (see Article 1064 § 1 of the Civil Code, cited above). However, as the Court has recently found, there is no case-law authority for Russian civil courts being able, in the absence of any results from the criminal investigation, to consider the merits of a civil claim relating to alleged serious criminal actions (see *Isayeva v. Russia*, no. 57950/00, § 155, 24 February 2005, and *Isayeva and Others v. Russia*, nos. 57947/00, 57948/00 and 57949/00, § 147, 24 February 2005). In the present case the criminal investigation did not yield any results. In the light of the above consideration the Court concludes that the applicant's civil claim was bound to fail, irrespective of the identity of the defendant.

*iii. Summary of the Court's findings and conclusion*

102. The Court has made the following findings in respect of the applicant's complaint that the Russian authorities did not establish the cause of Mr Tarariyev's death and made those responsible accountable.

The criminal investigation was slow and its scope was restricted, leaving out many crucial aspects of the events. The applicant's right to effective participation in the investigation was not secured. The prosecution had poorly prepared the evidentiary basis for the trial which ended in the acquittal of the suspect. Following the failure of the criminal proceedings the applicant did not have at her disposal an accessible and effective civil-law remedy, either because a civil claim was barred by operation of law or because it had no chances of success in the light of the existing judicial practice.

103. In these circumstances, the Court finds that there has been a violation of Article 2 of the Convention on account of the Russian authorities' failure to discharge their positive obligation to determine, in an adequate and comprehensive manner, the cause of death of Mr Tarariyev and to bring those responsible to account. The Court also considers that no separate examination of the same issue from the standpoint of Article 13 of the Convention is necessary.

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

104. The applicant complained that the lack of medicines during her son's detention at the Khadyzhensk colony, his handcuffing at Apsheronk Hospital and the conditions of his transport from Apsheronk Hospital to the

prison hospital violated the Convention guarantee against inhuman and degrading treatment, which reads as follows:

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

105. The Court has already examined the complaint about the medical conditions of detention at the Khadyzhensk colony from the standpoint of Article 2 of the Convention. It considers that it is not necessary to examine it separately under Article 3 of the Convention. It will therefore proceed to an examination of the complaints concerning Mr Tarariyev's handcuffing at the state hospital and the conditions of his transport to the prison hospital.

#### **A. Mr Tarariyev's handcuffing at Apsheronk Hospital**

106. The applicant submitted that she and Ms Anna T. had visited Mr Tarariyev at Apsheronk Hospital and seen him shackled to the bed by his left hand. She produced a statement by Ms T. with a detailed description of their visit.

107. The Government denied that the applicant had been allowed to enter Mr Tarariyev's room at Apsheronk Hospital and that handcuffs had been used on him. Referring to the findings of a supplementary inquest carried out by the Prosecutor General's Office and to the information obtained from the Federal Service for Execution of Sentences, they pointed out that, in accordance with the Penitentiary Act, handcuffs could only be used on detainees whose conduct gave reason to believe that they would escape or harm themselves or others (see paragraph 66 above). Mr Tarariyev's state of health rendered such conduct impossible and the use of handcuffs unnecessary. Besides, additionally security was provided by an armed mobile guard of several police officers.

108. The Court notes that the applicant's contention of having seen her son shackled to the hospital bed was disputed by the Government. The applicant's version was, however, supported by a statement of a witness, Ms T., submitted in the Convention proceedings. Subsequently Ms T. repeated her statements in an interview with a State official (see paragraph 60 above). The Government, on the other hand, did not substantiate their claim with any evidence, such as, for instance, statements by the hospital staff or by the police officers who had stood guard in Mr Tarariyev's room. They contended that the law did not require the use of handcuffs on a person in Mr Tarariyev's situation but they furnished no proof that the police officials had indeed acted in compliance with the legal requirements in the instant case. The Court notes that the Prosecutor General's Office continued to deny that the applicant and Ms T. had been allowed to visit Mr Tarariyev at Apsheronk Hospital even after the district prosecutor had obtained Ms T.'s testimony to the contrary. As the applicant's submissions were consistent

and supported by appropriate evidence, whereas the Government's contentions lacked substantiation, the Court lends credence to the applicant's version of events and finds it established that at least on 21 August 2002 Mr Tarariyev was attached with handcuffs to the bed at Apsheronk Hospital.

109. The Court reiterates that handcuffing does not normally give rise to an issue under Article 3 of the Convention where the measure has been imposed in connection with a lawful detention and does not entail use of force, or public exposure, exceeding what is reasonably considered necessary. In this regard, it is important to consider, for instance, whether there is a danger that the person concerned might abscond or cause injury or damage to himself or others (see *Hénaf v. France*, no. 65436/01, § 48, ECHR 2003-XI; *Mouisel v. France*, no. 67263/01, § 47, ECHR 2002-IX; and *Raninen v. Finland*, judgment of 16 December 1997, *Reports of Judgments and Decisions* 1997-VIII, § 56).

110. In the instant case it was not in dispute between the parties that Mr Tarariyev had not presented any danger of absconding or causing self-harm or injury to others. He was attached to the bed on the day after complex internal surgery. He was on a drip and could not stand up unaided. It also appears from Ms T.'s detailed deposition that a police officer armed with a submachine gun was present in Mr Tarariyev's room and two other officers remained on guard outside the room. In these circumstances, the Court considers that the use of handcuffs was disproportionate to the needs of security (compare *Hénaf* and *Mouisel*, both cited above).

111. Having regard to Mr Tarariyev's state of health, to the absence of any cause to fear that he represented a security risk and to the constant supervision by armed police officers, the Court finds that the use of restraints in these conditions amounted to inhuman treatment.

There has been therefore a violation of Article 3 of the Convention on account of Mr Tarariyev's handcuffing at the civilian hospital.

## **B. Conditions of Mr Tarariyev's transport to the prison hospital**

112. The applicant complained that Mr Tarariyev had been transported from the civilian hospital to the prison hospital by a standard-issue prison van. She had helped the hospital staff to load him onto a layer of padded cotton mattresses. She pointed out that the medical experts, the prosecutor's office and the prison hospital doctors had all concurred that the transport in unfit conditions had aggravated Mr Tarariyev's state of health.

113. The Government claimed that Mr Tarariyev had been transported in a "vehicle ... designed for transport of convicts and ... equipped with a stretcher, two mattresses, sheets and a pillow". Mr Tarariyev had been accompanied by an experienced nurse who had carried the necessary medical equipment and continued the intravenous injection of drugs. The

medical staff of Apsheronk Hospital had had no objections to the proposed conditions of transport. The Government referred to the written depositions by the nurse and by the head of the medical department of the Khadyzhensk colony.

114. The Court reiterates that the assessment of the level of severity which ill-treatment must attain to fall within the scope of Article 3 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, *Kudła v. Poland* [GC], no. 30210/96, § 91, ECHR 2000-XI, and *Peers v. Greece*, no. 28524/95, § 67, ECHR 2001-III). The Court has previously found a violation of Article 3 of the Convention in a Russian case where the applicant was transported in an overcrowded prison van (see *Khudoyorov v. Russia*, no. 6847/02, §§ 116-20, ECHR 2005-X).

115. It transpires from the parties' submissions, despite the difference in terms they used in their descriptions, that the vehicle at issue was designed for the transport of detainees rather than post-operative patients (see the prosecutor's decision of 21 June 2003, cited in paragraph 45 above). It was not an ambulance or any other type of hospital vehicle. A wheel stretcher was used to bring Mr Tarariyev to the vehicle, and inside the vehicle he was placed on the padded mattresses. The distance between the civilian and prison hospitals being more than one hundred kilometres, Mr Tarariyev was transported for more than two hours in these conditions.

116. The Court further notes that Mr Tarariyev's state of health was extremely worrying. He had had internal surgery merely two days beforehand and on the day of transport he was diagnosed with a breakdown of sutures, a condition requiring further surgical intervention. As the medical experts subsequently found, Mr Tarariyev had been "unfit for transport" (see paragraph 45 above). In these circumstances, the presence of a medical nurse could not compensate for the inadequate conditions of transport.

117. Having regard to Mr Tarariyev's serious condition, the duration of the transport and the detrimental impact of that treatment on his state of health, the Court considers that the transport of Mr Tarariyev in a standard-issue prison van must have considerably contributed to his suffering and therefore amounted to inhuman treatment.

There has therefore been a violation of Article 3 of the Convention on account of the conditions of Mr Tarariyev's transport.

### III. ALLEGATION OF HINDRANCE OF THE RIGHT OF INDIVIDUAL PETITION GUARANTEED BY ARTICLE 34 OF THE CONVENTION

118. The applicant complained that her witness, Ms T., had been summoned to the prosecutor's office and interviewed in connection with her application to the Court. The Court will consider whether these actions by the Russian authorities amounted to a hindrance of the applicant's right of individual petition under Article 34 of the Convention:

“The Court 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. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

119. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted by Article 34 that applicants should be able to communicate freely with the Convention organs without being subjected to any form of pressure from the authorities to withdraw or modify their complaints. The expression “any form of pressure” must be taken to cover not only direct coercion and flagrant acts of intimidation of applicants or their legal representatives but also other improper indirect acts or contacts designed to dissuade or discourage them from pursuing a Convention remedy. In a number of cases in which the authorities had questioned applicants about their applications, the Court has found them to be in breach of their obligations under Article 34 (or former Article 25 § 1) of the Convention (see *Kurt v. Turkey*, judgment of 25 May 1998, *Reports* 1998-III, § 160; *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 130, ECHR 1999-IV; *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports* 1996-IV, § 105; and *Orhan v. Turkey*, no. 25656/94, § 407, 18 June 2002; see also *Bilgin v. Turkey*, no. 23819/94, § 133, 16 November 2000; *Dulaş v. Turkey*, no. 25801/94, § 79, 30 January 2001; and *Akdeniz and Others v. Turkey*, no. 23954/94, § 118, 31 May 2001).

120. In the instant case it was not the applicant herself but her witness, Ms T., who had twice been asked to appear before a prosecutor and to answer a number of questions relating to one of the applicant's complaints to the Court. It is not necessary to examine whether the questioning constituted a formal “interview” within the meaning of that term in domestic law. The Government submitted records of the questioning and their accuracy was not disputed.

121. Both interviews concerned only one of the applicant's complaints to the Court: the one relating to the use of handcuffs on Mr Tarariyev at Apsheronk Hospital. It appears that Ms T. was not questioned about any other aspects of Ms Tarariyeva's application, beyond a general query as to whether she was aware of its contents and whether Ms Tarariyeva had asked

her to state untrue facts. At the first questioning Ms T. described the setting in Mr Tarariyev's room and the people who had been present, including police officers. At the second questioning she was asked to provide a detailed description of these officers and to indicate whether she could identify them. Assessing the contents of the questioning records as a whole, the Court forms the view that the interviewers attempted to obtain information which could be used for investigation of the treatment applied to Mr Tarariyev and for identification of those responsible. The Court further notes that Ms T. was not forced to give evidence to the prosecutor. It appears that the language used by the prosecutor did not contain any expressions, references or insinuations of a threatening or dissuasive nature (see, by contrast, *Petra v. Romania*, judgment of 23 September 1998, *Reports* 1998-VII, § 44).

122. In the particular circumstances of the present case, the Court finds that the questioning of Ms T. did not amount to “pressure”, “intimidation” or “harassment” which might have induced the applicant to withdraw or modify her application or hindered her in any other way in the exercise of her right of individual petition.

Consequently, the respondent State has not failed to comply with its obligations under Article 34 of the Convention.

#### IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

123. 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

124. The applicant asked the Court to determine the amount of compensation for the suffering and distress caused by the death of her son.

125. The Government considered the applicant's claim to be unsubstantiated.

126. The Court accepts that the applicant suffered distress and frustration because the State authorities did not take reasonable measures to protect the life of her son and failed to secure the identification and punishment of those responsible for his death. Making its assessment on an equitable basis, the Court awards the applicant 25,000 euros (EUR) in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

## **B. Costs and expenses**

127. The applicant claimed 20,000 US dollars for costs and expenses relating to her son's representation in the criminal proceedings and his funeral.

128. The Government pointed out that the amount was excessive and that the applicant had only submitted postal receipts to a total of 3,050 Russian roubles (RUR).

129. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were 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 100 for the proceedings before it.

## **C. Default interest**

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

## **FOR THESE REASONS, THE COURT**

1. *Holds* unanimously that there has been a violation of Article 2 of the Convention on account of the Russian authorities' failure to protect the applicant's son's right to life;
2. *Holds* unanimously that there has been a violation of Article 2 of the Convention on account of the Russian authorities' failure to determine the cause of death of the applicant's son and to bring those responsible to account;
3. *Holds* unanimously that no separate examination of Article 13 of the Convention is necessary;
4. *Holds* unanimously that there has been a violation of Article 3 of the Convention on account of the applicant's son's handcuffing;
5. *Holds* unanimously that there has been a violation of Article 3 of the Convention on account of the conditions of transport of the applicant's son from the civilian to the prison hospital;

6. *Holds*, by six votes to one, that the allegation of hindrance of the right of individual petition has not been made out;
7. *Holds* unanimously
  - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Russian roubles at the rate applicable at the date of settlement:
    - (i) EUR 25,000 (twenty-five thousand euros) in respect of non-pecuniary damage;
    - (ii) EUR 100 (one hundred euros) in respect of costs and expenses;
    - (iii) any tax that may be chargeable;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
8. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 14 December 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK  
Registrar

Peer LORENZEN  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr J. Borrego Borrego is annexed to this judgment.

P.L.  
C.W.

## PARTLY DISSENTING OPINION OF JUDGE BORREGO BORREGO

This opinion is not only the expression of my disagreement with the majority regarding Article 34, but also a token of my recognition and my gratitude to Ms T., this brave Russian woman and friend of the applicant.

The European Convention on Human Rights is an international treaty and as such it "... is binding upon the parties to it and must be performed by them in good faith" (Vienna Convention on the Law of Treaties, 23 May 1969, Article 26). The European Convention states that "the High Contracting Parties undertake not to hinder in any way the effective exercise of this right" (Article 34). The case-law regarding this issue "... of the utmost importance for the effective operation of the system..." is reflected in paragraph 119 of the judgment.

"Not to hinder in any way the effective exercise of this right" means, firstly and obviously, that the applicants and their relatives must not be subjected to any form of pressure – direct or indirect – from the authorities to withdraw or modify their complaints.

Secondly, and again obviously, effective exercise of the right of individual petition entitles High Contracting Parties to argue freely about the case, not to lie freely about the facts. It is very difficult to ensure effective operation of the system if the Contracting Party involved does not play its part fairly.

Much to my regret, I cannot agree with the majority's conclusion that there has been no violation of Article 34 in the present case.

Firstly, Ms T., who witnessed the conditions in which Mr Tarariyev was treated at the hospital, was subjected to pressure by the Russian authorities. Following a request by the Government's Representative before the European Court after the admissibility decision, Ms T. was summoned to the Severskiy district prosecutor's office, where she was asked "about violations of laws" (section 22 of the Public Prosecutors Act). Ms T. was summoned as an accused or suspect and therefore "the constitutional guarantee against self-incrimination had been explained to her" (paragraph 59). She was questioned on two consecutive days. Ms T. considered that she had clearly been intimidated.

As to the assessment of this questioning, the majority states that "the Court forms the view that the interviewers attempted to obtain information which could be used for investigation of the treatment applied to

Mr Tarariyev and for identification of those responsible” (paragraph 121). Although I respect this point of view, it seems unduly generous to me, more appropriate to a fairy tale than to the present case, as the Government have consistently and strongly denied any ill-treatment of Ms T.

In my opinion, the respondent State has failed to comply with its obligations under Article 34 of the Convention.

Secondly, lying is contrary to good faith and hinders the effective operation of the system. In their observations of 30 December 2004, the Government replied to the question whether the applicant's son had been handcuffed to the hospital bed by saying that “according to the Russian Federation Ministry of Justice and the Russian Federation General Prosecutor's Office, [these] allegations ... do not comport with reality”. Consequently, the decision on admissibility of 11 October 2005 states that “the Government challenged as untrue the applicant's allegation that Mr Tarariyev had been shackled to the hospital bed”.

Following this decision Ms T., the witness, was summoned to the prosecutor's office on two consecutive days (30 November and 1 December 2005). She repeated her statement and said “Mrs Tarariyeva did not ask me to confirm any facts which did not happen in reality”.

On 19 December 2005, in spite of what Ms T. had stated in the prosecutor's office, the Government said “[this] applicant's allegation ... does not meet the reality and misleads the Court. According to the Russian Federation General Prosecutor's Office, on the results of a repeatedly conducted check, it has been established that neither the applicant nor other persons ... had been admitted to Mr Tarariyev...”.

It seems obvious to me who made allegations that “do not meet with the reality and mislead the Court”. I consider this behaviour by a High Contracting Party as evidence that it failed to comply with its obligations under Article 34 of the Convention.

Finally, I would like to thank Ms T., as well as Ms Tarariyeva. At difficult moments in life, as the present case shows, exemplary behaviour comes mostly from women. It is an honour for me, as a judge of this Court, to work to ensure that people like Ms T. and Ms Tarariyeva have their fundamental rights and freedoms guaranteed by the enforcement of the Convention.