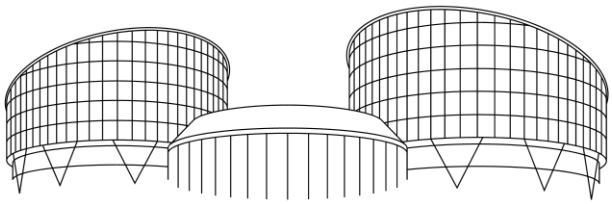

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF LUTSENKO v. UKRAINE

(Application no. 6492/11)

JUDGMENT

STRASBOURG

3 July 2012

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 Lutsenko v. Ukraine,

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

Dean Spielmann, *President,*
Mark Villiger,
Karel Jungwiert,
Boštjan M. Zupančič,
Ann Power-Forde,
Ganna Yudkivska,
André Potocki, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 17 April and 26 June 2012,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 6492/11) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Yuriy Vitaliyovych Lutsenko ("the applicant"), on 21 January 2011.

2. The applicant was represented by Mr I. Fomin and Ms V. Telychenko, lawyers practising in Kyiv, and Mr A. Bushchenko, a lawyer practising in Kharkiv. The Ukrainian Government ("the Government") were represented by their Agent, Ms V. Lutkovska, from the Ministry of Justice.

3. On 5 April 2011 the Court decided to give notice of the application to the Government. It also decided to give priority to the application (Rule 41).

4. The applicant and the Government each filed written observations (Rule 54 § 2 (b)).

5. A hearing took place in public in the Human Rights Building, Strasbourg, on 17 April 2012 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms V. LUTKOVSKA, *Agent*,
Mr N. KULCHYTSKYY, *Counsel*,
Mr M. BEM,
Mr I. ZINCHENKO,
Mr D. LOBAN, *Advisers*;

(b) *for the applicant*
Mr I. FOMIN,
Ms V. TELYCHENKO, *Counsel*s,
Ms T. TSIUKALO, *Adviser*.

The Court heard addresses by Ms V. Lutkovska, Ms V. Telychenko and Mr I. Fomin, as well as the answers by Ms V. Lutkovska and Ms V. Telychenko to questions put to the parties.

6. Judge Fura, having in the meantime left the Court, was replaced in the final deliberations by Judge Zupančič, formerly first substitute.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1964 and lives in Kyiv. He is a former Minister of the Interior and the leader of the opposition party Narodna Samooborona.

A. Institution of criminal proceedings against the applicant

8. On 2 November 2010 the General Prosecutor's Office ("the GPO") instituted criminal proceedings against the applicant and another individual, Mr P., under Article 191 § 3 of the Criminal Code. The GPO asserted that while he was Minister of the Interior from December 2007 to January 2010 the applicant had unlawfully arranged for different work-related benefits for his driver – the aforementioned Mr P. On the same date, the applicant gave a written undertaking not to abscond to the investigator.

9. On 5 November 2010 the applicant was formally charged.

10. During the pre-trial investigation, the applicant appeared for all investigating activities and the investigator had no complaints about his cooperation.

11. On 11 December 2010 the GPO instituted another criminal case against the applicant for exceeding his official powers under Article 365 § 3 of the Criminal Code on the grounds that the applicant had arranged for the allocation of a one-room apartment to his driver Mr P.

12. The two criminal cases were joined together (hereinafter – "the first criminal case").

13. On 13 December 2010 the GPO completed the investigation in the case and formally indicted the applicant on both counts, having, however, reclassified his actions specified in the first charge under Article 191 § 5 of

the Criminal Code. The applicant was summoned to appear before the investigator in order to study the criminal case file against him.

B. Study of the case-file materials

1. Applicant's version of events

14. On 15 December 2010 the applicant was given only the minority of the criminal case file for familiarisation, being informed that the rest of the materials were not available. The investigator summoned the applicant to study the case file on 16 and 17 December 2010.

15. On 17 December 2010 the applicant and his lawyer appeared before the investigator to study the case file. However, the investigator did not provide them with the complete file, referring to the fact that some materials were still with the Pechersky Court. The investigator served on the applicant a summons to appear on 20 through 24 December 2010 in order that his familiarisation with the case file be continued.

16. On 20 and 21 December 2010 the case file materials were stated to be not ready, despite the applicant's desire to acquaint himself with them.

17. On 22 December 2010 the investigator informed the applicant that he had decided that all accused and their lawyers would be given only one volume of the file at a time, and the next volume would be given only after all of them had completed their familiarisation with the previous one. He added that the copy of the list of materials of each volume would be given after such familiarisation. On the same date, the applicant's representative asked to be allowed to make digital photos of the materials in the case file. His request was rejected.

18. On 22 and 23 December 2010 the applicant and his lawyer were acquainted with the materials in the case file.

19. On 24 December 2010 the applicant's representative was busy representing a client in another set of proceedings, of which he had informed the investigator in advance.

2. The Government's version of events

20. On 8 December 2010 the applicant was served with a summons to appear before the investigator on 14 December 2010.

21. On 14, 16, 17, 20 and 24 December 2010 he failed to appear to study the case file.

22. On 15, 21, 22 and 23 December 2010 the applicant came to the GPO to study the case file.

23. On 20 December 2010 the investigator issued a resolution establishing the order of studying the case file. The applicant was notified of this order on 21 December 2010.

C. Other events

24. On 18 December 2010 the weekly newspaper *Zerkalo Nedeli* (Mirror Weekly) published an interview with the applicant entitled "*Yuriy Lutsenko: I try to think less about the bad things ...*". In this interview, he denied all accusations against him. Being asked about statements made by his former deputy minister, Mr K., the applicant said:

> "For reasons unknown to me K. [...] says that I allegedly called him to my office, gave him a resolution prepared for his signature and told him that he should sign it. How is this confirmed? Only by the words of a man who is frightened by something...
>
> What confirmed his words? Nothing. All charges are based not on documents that I signed, but on oral instructions which I allegedly gave. Why in this case I did not give such oral instructions to my other subordinates and on other occasions is a mystery..."

25. On 24 December 2010 GPO investigator V. instituted another set of criminal proceedings against the applicant for abuse of office under Article 364 § 3 of the Criminal Code (hereinafter – "the second criminal case"). The applicant was suspected of unlawful authorisation of search and seizure activities against an individual. The same day the investigation in the first criminal case was resumed. Five days later, the two cases were joined.

26. On 25 December 2010 the same investigator prepared an application to the Pechersky Court, seeking to have the preventive measure applied to the applicant in respect of the first criminal case changed from an undertaking not to abscond to pre-trial detention. The investigator stated that the applicant had not complied with his procedural decisions and had attempted to avoid participating in the investigation by, in particular, systematically failing to appear before the investigator at the fixed time. He further noted that the investigation had been completed on 13 December 2010 and that the applicant had been indicted. On 14 December 2010, being summoned to the GPO's premises in order to study the case-file, the applicant had failed to do so and, according to Internet sources, had held a press conference instead.

According to the investigator, during the press conference the applicant:

> "... with a view to avoiding criminal responsibility for crimes committed, distorting public opinion about crimes committed by him, discrediting the prosecuting authorities and influencing the upcoming trial on the merits, gave comments regarding the charges against him.
>
> Thus, Y. Lutsenko disclosed materials of the pre-trial investigation, distorted information about his case known to him, tried to impose his views on society as to his alleged innocence and to blame others for the crime committed, although during the entire time of the pre-trial investigation Y. Lutsenko refused to give any testimony on the merits of the charge against him."

The investigator further noted in his application that the applicant had failed to study the case file in an appropriate manner. According to him, on

15 December 2010 the applicant was given the case-file materials and was informed that he was able to study the case file everyday from 9 a.m. to 6 p.m. However, on that date he only studied the case-file materials for five minutes. On 16, 17, 20 and 24 December 2010 the applicant failed to appear at all and on 21, 22 and 23 December the applicant only studied the case file for around two hours. Moreover, the applicant continued giving interviews in order to distort public opinion and to influence the investigation and trial. The investigator concluded that the applicant should be detained because he had committed a serious crime, had impeded the investigation by purposefully delaying the investigation, had constantly avoided appearing before the investigator, had not complied with the investigator's decisions and had put pressure on witnesses by discrediting them, therefore seeking to avoid criminal liability.

27. On the same date the First Deputy Prosecutor General approved the above application for the applicant's arrest.

D. The applicant's arrest and detention

28. On Sunday 26 December 2010 at 12.45 a.m. the applicant was arrested near his house by officers of the Security Service and the GPO investigator in the framework of the second criminal case.

29. According to the applicant, during his arrest, he was not informed of the reasons for his arrest and was not given a copy of the charge sheet. The investigator also refused to give a copy of the charge sheet to the applicant's representative. According to the Government, the applicant was served with a copy of the decision to institute the second criminal case against him, but refused to sign it.

30. The record of the applicant's arrest indicated that witnesses had pointed to the applicant as a person who had committed a crime and that his detention was necessary in order to prevent him from avoiding participating in or jeopardising the investigation, to exclude the possibility of continuation of criminal activities by him and to ensure his isolation from society. It was further indicated that there was other (unspecified) information that gave grounds to suspect the applicant of committing a crime. The arrest record also contained reference to Article 364 § 3 of the Criminal Code. According to the record, the applicant refused to sign it.

31. On 27 December 2010 the applicant was taken to the Pechersky Court. His lawyer found out about the hearing twenty minutes prior to its start. At the beginning of the hearing, the applicant's lawyer asked for the media to be present, given that the applicant's arrest involved a matter of significant public interest. The prosecutor objected to this request on the grounds that the proceedings did not concern the applicant's arrest in the second criminal case, but rather the GPO's application in relation to the first criminal case to alter the preventive measure concerning the applicant from

a written obligation not to abscond to that of being held in custody. According to the applicant, only at this point did he and his lawyer find out that the hearing concerned the GPO's application to change the preventive measure affecting the applicant and not the grounds for his arrest. The applicant complained of irregularities in his arrest, but the prosecutor repeatedly stressed that his arrest was not under examination at the hearing. The applicant and his lawyer then asked the court to adjourn the hearing in order to study the GPO's application and its supporting materials and to present documents concerning the applicant's personal situation. The court rejected the request as unsubstantiated. It noted in particular that the applicant had already explained his personal situation and that nobody had contested its veracity.

32. The court allowed the application and ordered the applicant's detention, accepting the GPO's reasoning and also finding that there were no personal circumstances pertaining to the applicant that would prevent his being held in custody, that the applicant had sought to evade investigative actions and decisions of the investigator, that he was accused of a crime punishable by imprisonment from three to seven years, that he had not admitted his guilt and had refused to make a statement, and that he was capable of influencing the investigation and putting pressure on the witnesses, either personally or through others. The court further rejected written request by seven Members of Parliament for the applicant's release on bail on their guarantee.

33. The applicant's lawyer appealed against the decision of 27 December 2010 to the Kyiv City Court of Appeal, considering it unfounded. In his appeal, he claimed, *inter alia*, that the applicant had not violated his obligation not to abscond, that studying the case file was the applicant's right and not an obligation, and that the investigator had not given him all the materials in the case file and had knowingly restricted his right of access to the case file. The lawyer further stated that he and his client had not known the grounds for arrest well in advance of the hearing and that the court had refused to postpone the hearing, having put them, therefore, in a disadvantageous position, in violation of the principle of equality of arms. He complained that there was no evidence or information proving that the applicant would seek to evade the investigation or jeopardise it. The lawyer also pointed out that the first-instance court had referred to the fact that the applicant had refused to admit his guilt and to make a statement as grounds for his arrest, thereby violating the applicant's constitutional rights.

34. On 5 January 2011 the Kyiv City Court of Appeal rejected the appeal and upheld the decision of the first-instance court. It rejected the applicant's complaints as being unsupported by the case-file materials. It also rejected written request by twenty nine Members of Parliament,

supported by the Ukrainian Ombudsman, for the applicant's release on bail on their guarantee.

35. On 16 February 2011 the Pechersky Court prolonged the applicant's detention up to four months. This decision was upheld by the Kyiv Court of Appeal.

36. On 21 April 2011 the Kyiv City Court of Appeal prolonged the applicant's detention for up to five months. It noted that despite the fact that the applicant had completed the study of the case-file materials, there were still investigative actions to be conducted with the applicant's co-defendant, Mr P., and the lawyers. It further noted that there were no grounds to change the preventive measure applied to the applicant, taking into account the gravity of the charges against him, his family status and state of health.

37. On 23 May 2011 the Pechersky Court upheld the applicant's detention pending trial without fixing any deadline.

38. On 27 February 2012 the applicant was found guilty and sentenced to four years' imprisonment and confiscation of property.

39. On 16 May 2012 the Kyiv City Court of Appeal upheld the judgment of the first instance court. The applicant appealed in cassation and these proceedings are still pending.

II. RELEVANT LAW AND PRACTICE

A. Relevant domestic law and practice

1. Constitution

40. The relevant provisions of the Constitution of Ukraine provide:

Article 19

"...Bodies exercising State power and local self-government bodies and their officials are obliged to act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws of Ukraine."

Article 29

"Every person has the right to freedom and personal inviolability.

No one shall be arrested or held in custody other than pursuant to a reasoned court decision and [then] only on the grounds and in accordance with the procedure established by law.

..."

Everyone arrested or detained shall be informed without delay of the reasons for his or her arrest or detention, apprised of his or her rights, and from the moment of detention shall be given the opportunity to personally defend himself or herself, or to have the legal assistance of defence counsel.

Everyone detained has the right to challenge his or her detention in court at any time.

Relatives of an arrested or detained person shall be informed immediately of his or her arrest or detention."

Article 34

"Everyone is guaranteed the right to freedom of thought and speech, and to the free expression of his or her views and beliefs..."

Article 62

"A person is presumed innocent of committing a crime and shall not be subjected to criminal punishment until his or her guilt is proved through the process of law and established by a court verdict of guilty..."

Article 63

"A person shall not bear responsibility for refusing to testify or to explain anything about himself or herself, members of his or her family or close relatives in the degree determined by law..."

2. Criminal Code

41. Relevant provisions of the Code read as follows:

Article 191
Misappropriation, embezzlement or conversion of property by malfeasance

"1. Misappropriation or embezzlement of somebody else's property by a person to whom it was entrusted...

2. Misappropriation, embezzlement or conversion of property by malfeasance...

3. Any such actions as provided for by paragraph 1 or 2 of this Article, if repeated or committed by a group of persons [acting] upon their prior conspiracy, shall be punishable by restraint of liberty for a term of three to five years, or imprisonment for a term of three to eight years, with a prohibition on the right to occupy certain positions or engage in certain activities for a term of up to three years.

4. Any such actions as provided for by paragraphs 1, 2 or 3 of this Article, if committed in respect of a large amount...

5. Any such actions as provided for by paragraphs 1, 2, 3 or 4 of this Article, if committed in respect of an especially large amount, or by an organized group, shall be

punishable by imprisonment for a term of seven to twelve years, with a prohibition on the right to occupy certain positions or engage in certain activities for a term of up to three years and confiscation of property."

Article 364 Abuse of authority or office

1. Abuse of authority or office, namely the intentional use of authority or official position contrary to the official interests [of the State] by an official for financial gain or other personal benefit or the benefit of any third parties, where it causes substantial damage to legally protected rights, freedoms and interests of individual citizens, or to State and public interests, or the interests of legal persons...

2. The same act, if it causes any grave consequences...

3. Any such actions as provided for by paragraph 1 or 2 of this Article, if committed by a law enforcement officer, shall be punishable by imprisonment for a term of five to twelve years with deprivation of the right to occupy certain positions or engage in certain activities for a term of up to three years and forfeiture of property.

Article 365 Exceeding authority or official powers

1. Exceeding authority or official powers, namely the intentional commission of acts by an official which patently exceed the rights and powers vested in him/her, where it causes substantial damage to the legally protected rights and interests of individual citizens, or State and public interests, or the interests of legal persons...

2. Exceeding authority or official powers accompanied with violence, use of weapons, or actions that cause pain or are derogatory to the victim's personal dignity...

3. Any such actions as provided for by paragraph 1 or 2 of this Article, if they cause grave consequences, shall be punishable by imprisonment for a term of seven to ten years with deprivation of the right to occupy certain positions or engage in certain activities for a term of up to three years.

3. Code of Criminal Procedure

42. Relevant provisions of the Code read as follows:

Article 43

The accused and his rights

"... The accused has the right to ... get acquainted with all materials in the case file after the [conclusion of the] preliminary investigation or inquiry..."

Article 43-1

The suspect

"... The suspect has the right to ... request the review by a court or prosecutor of the legality of his detention, lodge complaints against the actions and decisions of ... the investigator..."

Article 48

Duties and rights of defence counsel

"...From the moment of his entry into the case, counsel for the defendant has the right:

...

(3) to get acquainted with the materials which substantiate the detention of a suspect or choice of preventive measure or indictment, and, after the [conclusion of the] pre-trial investigation, with all materials in the case file..."

Article 106: Detention of a criminal suspect by a body of inquiry

"A body of inquiry shall be entitled to arrest a person suspected of a criminal offence for which a penalty in the form of deprivation of liberty may be imposed only on one of the following grounds:

(1) if the person is discovered whilst, or immediately after, committing an offence;

(2) if eyewitnesses, including victims, directly identify this person as the one who committed the offence;

(3) if clear traces of the offence are found on the body of the suspect or on the clothing which he is wearing or which is kept at his home.

For each case of detention of a criminal suspect, the body of inquiry shall be required to draw up a record mentioning the grounds [for detention], the motives [for detention], the day, time, year and month [of detention], the place of detention, the explanations of the person detained and the time when it was recorded that the suspect was informed of his right to have a meeting with defence counsel before his first questioning, in accordance with the procedure provided for in paragraph 2 of Article 21 of the present Code. The record of detention shall be signed by the person who drew it up and by the detainee.

A copy of the record with a list of his rights and obligations shall be immediately handed to the detainee and shall be sent to the prosecutor. At the request of the prosecutor, the material which served as grounds for detention shall also be sent to him.

The body of inquiry shall immediately inform one of the suspect's relatives of his detention...

Within seventy-two hours after the arrest the body of inquiry shall:

(1) release the detainee if the suspicion that he committed the crime has not been confirmed, if the term of detention established by law has expired or if the arrest has been effected in violation of the requirements of paragraphs 1 and 2 of the present Article;

(2) release the detainee and select a non-custodial preventive measure; [or]

(3) bring the detainee before a judge with a request to impose a custodial preventive measure on him or her.

If the detention is appealed against to a court, the detainee's complaint shall be immediately sent by the head of the detention facility to the court. The judge shall consider the complaint together with the request by the body of inquiry for application of the preventive measure. If the complaint is received after the preventive measure was applied, the judge shall examine it within three days after receiving it. If the request has not been received or if the complaint has been received after seventy-two hours of detention, the complaint shall be considered by the judge within five days after receiving it.

The complaint shall be considered in accordance with the requirements of Article 165-2 of this Code. Following its examination, the judge shall give a ruling, either declaring that the detention is lawful or allowing the complaint and finding the detention to be unlawful.

The ruling of the judge may be appealed against within seven days from the date of its adoption by the prosecutor, the person concerned, or his or her defence counsel or legal representative. Lodging such an appeal does not suspend the execution of the court's ruling.

Detention of a criminal suspect shall not last for more than seventy-two hours.

If, within the terms established by law, the ruling of the judge on the application of a custodial preventive measure or on the release of the detainee has not arrived at the pre-trial detention facility, the head of the pre-trial detention facility shall release the person concerned, drawing up a record to that effect, and shall inform the official or body that carried out the arrest accordingly."

Article 135

Compulsory attendance by an accused

"An accused must appear upon the investigator's summons at the fixed time.

In case of failure to appear without valid reasons, the accused shall be taken to the investigator by force..."

Article 142

Explaining his or her rights to an accused during an investigation

"When charging an accused, the investigator must explain to the accused that during the pre-trial investigation he or she is entitled to:

...

(2) make a statement about the charges against him or her or refuse to make a statement and to answer questions;

...

(6) with the permission of the investigator, be present at the performance of certain investigative actions;

(7) after the completion of the pre-trial investigation, get acquainted with all the materials in the case file...”

Article 148

Purpose and grounds for the application of preventive measures

“Preventive measures shall be imposed on a suspect, accused, defendant or convicted person in order to prevent him or her from attempting to abscond from an inquiry, investigation or the court, to obstruct the establishment of the truth in a criminal case or to pursue criminal activities, and in order to ensure the enforcement of procedural decisions.

Preventive measures shall be imposed where there are sufficient grounds to believe that the suspect, accused, defendant or convicted person will attempt to abscond from the investigation and the court, or if he or she fails to comply with procedural decisions, or obstructs the establishment of the truth in the case or pursues criminal activities.

If there are insufficient grounds for the imposition of preventive measures, the suspect, accused or convicted person shall sign a written statement undertaking to appear upon notification by the inquirer, investigator, prosecutor or the court, and shall also undertake to notify them of any change in his place of residence.

If a preventive measure is applicable to a suspect, he or she shall be charged within ten days from the time of imposition of the measure. In the event that the indictment is not issued within that time, the preventive measure shall be annulled.”

Article 150

Circumstances to be taken into account in choosing a preventive measure

“In resolving the issue of imposing a preventive measure, in addition to the circumstances specified in Article 148 of this Code, such circumstances as the gravity of the alleged offence, the person’s age, state of health, family and financial status, type of employment, place of residence and any other circumstances relating to the person shall be taken into consideration.”

Article 151

Written undertaking not to abscond

"A written undertaking not to abscond is a written commitment by a suspect or an accused not to leave his or her place of permanent residence or temporary address without the permission of the investigator.

If the suspect or accused breaches this written undertaking not to abscond, it may be replaced by a more stringent preventive measure. The suspect or the accused shall be informed about this upon giving the written undertaking not to abscond."

Article 165-2: Procedure for the selection of a preventive measure

"At the stage of the pre-trial investigation, a non-custodial preventive measure shall be selected by the body of inquiry, investigator or prosecutor.

In the event that the body of inquiry or investigator considers that there are grounds for selecting a custodial preventive measure, with the prosecutor's consent [it or] he shall lodge an application with the court. The prosecutor is entitled to lodge an application to the same effect. In determining this issue, the prosecutor shall be obliged to familiarise himself with all the material evidence in the case that would justify placing the person in custody, and to verify that the evidence was received in a lawful manner and is sufficient for charging the person.

The application shall be considered within seventy-two hours of the time at which the suspect or accused is detained.

In the event that the application concerns the detention of a person who is not currently deprived of his liberty, the judge shall be entitled, by means of an order, to give permission for the suspect to be detained and brought before the court under guard. Detention in such cases may not exceed seventy-two hours; and in the event that the person is outside the locality where the court is situated, it may not exceed forty-eight hours from the moment at which the detainee is brought within the locality.

Upon receiving the application, the judge shall examine the material in the criminal case file submitted by the investigating bodies or investigator. A prosecutor shall question the suspect or accused and, if necessary, shall hear evidence from the person who is the subject of the proceedings, shall obtain the opinion of the previous prosecutor or defence counsel, if the latter appeared before the court, and shall make an order:

(1) refusing to select the preventive measure if there are no grounds for doing so; [or]

(2) selecting a preventive measure in the form of taking of the suspect or accused into custody.

The court shall be entitled to select a non-custodial preventive measure for the suspect or accused if the investigator or prosecutor refuses to select a custodial preventive measure for him or her.

The judge's order may be appealed against to the court of appeal by the prosecutor, suspect, accused or his or her defence counsel or legal representative, within three days from the date on which it was made. The lodging of an appeal shall not suspend the execution of the judge's order."

Article 218 (in force at the material time)

Informing the accused of the termination of the investigation of the case and allowing him to study the materials in the case file

"After deciding that the evidence collected in the case is sufficient to warrant an indictment, and after complying with the terms of Article 217 of this Code, the investigator shall inform the accused that the investigation of his case has ended and that he has the right to get acquainted with all of the materials in the case file personally and/or with the assistance of counsel...

If the accused has not shown any interest in familiarising himself with the materials in the case file with the participation of counsel, he shall be personally provided with all of the materials in the case file for familiarisation. In the course of this familiarisation process, the accused has the right to make extracts (to copy in writing) and to lodge motions. The investigator must allow all accused persons, even if there are several in one case, to familiarise themselves with all the materials in the case file...

...Preliminary investigation materials presented for familiarisation shall be filed and numbered. During the presentation of the materials of the pre-trial investigation, the investigator shall be obliged to provide the accused, upon request of the latter, with a duly certified copy of the list of the materials in the case file...

The time afforded to the accused and his counsel for familiarisation with all materials in the case file shall not be limited."

4. Domestic courts' case-law

43. The Government submitted two decisions of the domestic courts in which individuals had been awarded compensation for their unlawful detention.

44. In a decision of 17 January 2007, the Odessa Regional Court of Appeal awarded damages to a person who had been arrested by the police on 22 November 2005 but released the next day following the intervention of a prosecutor, who had found that person's arrest unlawful and quashed the police's decision to arrest. On 5 December 2005 the Bilgorod-Dnistrovskiy Local Court passed a resolution confirming the unlawfulness of the arrest.

45. In a decision of 11 October 2007, the Kyiv Court of Appeal awarded damages to a person who had been detained for twenty-two hours on 7 and 8 July 2002 at a police station without any documentation and had then been released. In this case, the person's detention was found unlawful by the same court of appeal on 25 May 2006, as the person's arrest and detention had not complied with Article 106 of the Code of Criminal Procedure.

B. Relevant international materials

1. *The Country Reports on Human Rights Practices by the US Department of State*

46. The Country Reports on Human Rights Practices of the US Department of State (hereafter "the Reports") for 2010, released on 8 April 2011, noted with respect to Ukraine:

"d. Arbitrary Arrest or Detention

The constitution and the law prohibit arbitrary arrest and detention; however, in practice problems remained.

There was a sharp increase in charges brought against opposition politicians after the appointment of a new prosecutor general on November 4, giving rise to the appearance of selective and politically motivated prosecution by the Yanukovych government. Between November 1 and December 31, prosecutors brought charges against former prime minister Yulia Tymoshenko and more than eight high-level members of her government for abuse of office and/or misuse of state funds during their tenure. The questioning of accused individuals by government prosecutors, which often lasted for hours at a time over a period of several days, and the denial of bail in certain cases further exacerbated the perception of politically motivated prosecution (see section 4). The government contended that the prosecutions were not targeting the opposition, and that there were many ongoing investigations of members of the governing party; however, with only a few exceptions these were low-level, career officials.

On December 12, the UHHRU [the Ukrainian Helsinki Human Rights Union] and the Kharkiv Human Rights Group issued a statement that the government's criminal prosecutions were only aimed at members of the opposition. As a result, the government's actions "spell the effective use of criminal court proceedings for political ends... and run counter to democratic values based on equality of all before the law and undermines the foundations of criminal justice," the statement said.

On December 26, police detained former interior minister Yuriy Lutsenko in Kyiv on allegations of embezzlement, abuse of office, and forgery. The appeals court denied his petition for bail and approved the prosecutor general's request for a two-month detention. Local human rights observers and opposition commentators described Lutsenko's arrest as politically motivated, given the administrative nature of his alleged offenses. Lutsenko alleged that the prosecutor's office ignored his constitutional rights throughout the investigation, in particular, delaying access to and denying time to review case materials and creating other "artificial barriers" to his right to become acquainted with the case..."

2. *European Parliament resolution of 9 June 2011 on Ukraine: the cases of Yulia Tymoshenko and other members of the former government*

"The European Parliament,

...G. whereas 12 former high-ranking officials from the Tymoshenko government are in pre-trial detention, including the former Interior Minister, Yuri Lutsenko, one of the leaders of the People's Self-Defence Party, who has been charged with abuse of office and misappropriation of funds and was arrested on 26 December 2010 for alleged non-cooperation with the prosecution, and the former First Deputy Minister of Justice, Yevhen Korniychuk, who was arrested on 22 December 2010 on charges of breaking the law in connection with public procurement procedures for legal services,

H. whereas Mr Lutsenko was not released from pre-trial detention when his trial opened on 23 May 2011, despite the fact that detention for alleged non-cooperation in the investigation of his case is an extremely disproportionate measure,

I. whereas a preliminary report of the Danish Helsinki Committee for Human Rights on the Lutsenko and Korniychuk trials has listed massive violations of the European Convention on Human Rights...

N. whereas the EU continues to emphasise the need for respect to be shown for the rule of law, incorporating fair, impartial and independent legal processes, while avoiding the danger of giving rise to any perception that judicial measures are being used selectively; whereas the EU considers these principles especially important in a country which aspires to enter into a deeper contractual relationship based on a political association,

1. Stresses the importance of ensuring the utmost transparency in investigations, prosecutions and trials, and warns against any use of criminal law as a tool to achieve political ends;

2. Is concerned about the increase in selective prosecution of figures from the political opposition in Ukraine as well as the disproportionality of measures applied, particularly in the cases of Ms Tymoshenko and Mr Lutsenko, former Interior Minister, and notes that Mr Lutsenko has been in custody since 26 December 2010; expresses its support for the Ukrainian Human Rights Commissioner, Nina Karpachova, who has asked the Ukrainian Prosecutor General to consider the possibility of applying preventive measures that do not involve detention...

4. Stresses that ongoing investigations of prominent Ukrainian political leaders should not preclude them from actively participating in the political life of the country, meeting voters and travelling to international meetings; calls, therefore, on the Ukrainian authorities to lift the travel ban, both domestically and internationally, on Yulia Tymoshenko and other key political figures..."

3. A Freedom House Report on the State of Democracy and Human Rights in Ukraine

47. In April 2011, Freedom House issued the above report under the title *Sounding the Alarm: Protecting Democracy in Ukraine*. The relevant extracts from the report read as follows:

"Corruption

... the government's anticorruption campaign lacks credibility. Authorities point to the prosecution of former prime minister Tymoshenko and former interior minister

Yuriy Lutsenko as a signal that corruption will not be tolerated and that politicians are not above the law. However, these cases are not focused on charges of personal enrichment, but rather on administrative abuses. The government is correct that the prosecutions send a strong signal, but that signal is actually a warning to other would-be opposition figures not to challenge the authorities...

Judiciary

The Yanukovych government has made judicial reform one of its top priorities. Much is at stake, as one of the most serious accusations leveled against the administration is that it is using the justice system—and specifically the prosecutor general's office and the SBU—to punish political opponents. Arguably no other issue has generated as much attention and criticism from inside Ukraine and from the international community than this perception of selective prosecutions, especially against former prime minister Tymoshenko and her associates. The level of concern has led the U.S. and other Western embassies, as well as officials in Brussels, to issue public statements highlighting this issue. Tymoshenko's is the most prominent case, but charges have been brought against nearly a dozen other top officials from her government, including former interior minister Yuriy Lutsenko and Ihor Didenko, the former deputy chief executive of the national energy company, Naftogaz Ukrainy. The charges brought against them, while not inconsequential, are nonetheless seen by many observers as a misuse of the judicial process. This is not to imply that the government and prosecutor general's office should not vigorously pursue all cases of corruption, or that former senior officials should be immune from fair prosecution. But the authorities have an extra burden to pursue such cases in a credible fashion, something they have failed so far to do. The government and prosecutor's office, anticipating such criticism, note that more than 350 current officials are being investigated for or charged with corrupt activities. None of these individuals, however, hold enough power or influence to suggest that justice is being pursued fairly and blindly. The highest-ranking official currently under investigation in Kyiv is Bohdan Presner, former deputy minister for environmental protection in Yanukovych's administration.

Even if it disputes the claims of selective prosecution, the government understands that, at a minimum, it has a perception problem. As one official acknowledged, the judicial powers should not behave the way they have behaved of late. The same official unfavorably compared the situation today to that before the Orange Revolution, and expressed concern that the judicial system agrees to whatever law enforcement agencies request. Indeed, the strong perception among many observers is that the judicial system does not serve as a check or balance against the executive branch. Such concerns are not allayed by comments from the head of the Constitutional Court, who is reported to have said that Yanukovych can always rely on the loyalty of the court, or by a top law enforcement official who said that Yanukovych can count on us...

Conclusions and Recommendations

...In that spirit, to prevent further democratic backsliding in Ukraine, and to support constructive initiatives both inside and outside the government, the assessment team recommends the following:

- For President Yanukovych and his government:

...

- Halt politically motivated prosecutions carried out by the prosecutor general's office against former leading political figures, while maintaining a credible campaign to root out corruption and foster accountability..."

4. Legal Monitoring in Ukraine by the Danish Helsinki Committee for Human Rights

48. As part of their Legal Monitoring in Ukraine, the Danish Helsinki Committee issued on 28 April 2011 a "Preliminary Report on the trials against former Minister of Interior Yurij Lutsenko and former First Deputy Minister of Justice Yevhen Korniychuk". The relevant parts of the report read as follows:

"...

It is not the purpose of the monitoring of the criminal cases to establish whether the defendants are guilty or innocent. Ukraine ranks very high on international lists of corruption and any honest attempt to fight it will be welcomed by the international community, even if it should be against politicians from the former regime. Smooth transfer of power from one government to the next is however so important an element in a functioning democracy and prosecution against so many members of a former government so seldomly seen, even in that part of the world, that the present government must understand and accept international skepticism as to its motives. Especially as the present government generally is considered to have a poor record in fighting corruption and could have an evident interest in removing prominent political opponents from future elections.

...

The case against Yurij Lutsenko

Yurij Lutsenko belonged to the Socialist Party during 1991-2006, when he established the People´s Self-Defense Party. He was Minister of Interior in 2005-2006 and again in 2007-2010. He is now Deputy Editor-in-Chief of the newspaper "Silski Visti".

During Mr. Lutsenko's work in the ministry at that time opposition politicians, among others the present Vice Prime Minister Borys Kolesnikov and the late ex-governor of Kharkiv Oblast Yevhen Kushnariov, were investigated and detained, and the office of the oligarch and member of the parliament from the Party of Regions Rinat Akhmetov was searched.

Investigation against Mr. Lutsenko was opened on 2.11.2010. On 5 November 2010 he accepted a decision by the investigator of a preventive measure in the form of prohibition against leaving his registered residence.

The charges were changed on 13.12.2010 and the pre-trial investigation declared finished on the same day, resulting in 47 volumes of case-file. The final charges concerned violation of Art. 191, para. 5, (misappropriation of state property in especially gross amount through abuse of office by an organized group) and Art. 365,

para. 3 (excess of official powers that caused grave consequences), for the following alleged actions:

1. unlawful promotion of Mr. Lutsenko's driver to the rank of police officer, leading to losses caused to the state because of increased salary and payment of other benefits.

2. allowing expenses for the organization of the annual Militsia´s Day festivities in 2009 in violation of a resolution of the government to halt such expenses.

3. having exceeded his power as Minister in connection with the police monitoring of a driver of the former head of the Security Service, who was suspected of complicity in the poisoning of former President of Ukraine Mr. Yushchenko.

On 24.12.2010 the investigation was reopened.

Lutsenko was arrested on 26 December 2010 for having violated Article 135 of the Criminal Procedure Code of Ukraine by having avoided to acquaint himself with the materials of the case at the time dictated by the investigator. On several days Mr. Lutsenko had failed to appear citing his attorney´s involvement in another criminal case, and on the days where he actually did turn up, he was found to have deliberately drawn out this process. Additionally he had allegedly disclosed via the mass media information gathered by pre-trial investigation in his criminal case.

On 21.4.2011 the Kyiv City Court of Appeal extended the detention of Mr. Lutsenko for another month till 27th of May. Few days before the court hearing Mr. Lutsenko finished reviewing the case-file. The prosecution, however, requested further extension due to the fact that legal representatives of Mr. Lutsenko failed to finalize their familiarizing with the case-file against Mr. Lutsenko.

Observations, discussions and conclusions:

...

2. According to the Ukrainian Criminal Procedure Code, any preventive measures, including custody, are applied when there are grounds to believe that a person will try to abscond or avoid carrying out procedural decisions, impede the course of justice or continue their criminal activities, as well as to ensure the enforcement of procedural decisions.

The law itself is not that different from the legislation of other countries. What is different is however the widespread use of pre-trial detention, as also seen by the detention of Mr. Lutsenko and Mr. Korniychuk, neither of whom would probably have been detained in countries with another legal tradition. A total figure of about 40.000 detained at any time has been mentioned.

The European Court of Human Rights dealt in its judgment of 10.2.2011 in the case of *Kharchenko vs. Ukraine* with the excessive use of detention in Ukraine.

The problems of the use of detention in general and in these two cases seem to have been more generally recognized also by authorities in Ukraine. The Monitor learned that the Ombudsman personally has intervened in both cases and informed the courts and the President of Ukraine that the use of detention in general and in these

individual cases in her opinion was a violation of their human rights. In most countries such an intervention in a pending case from an ombudsman to the President on activities of the judiciary would probably lead to raised eyebrows; it is mentioned here only to demonstrate the point on violation of human rights.

...

3. In neither of the monitored cases have individual reasons to support the need of pre-trial detention been given by the court. In the Lutsenko case the court only refers that: "*the case materials have data that indicate a possibility by Yurij Lutsenko personally and through others in the future to hamper the exercise of procedural decision in the case and the effect on witnesses*". This clearly is not an individual justification for the legality of the use of detention with regard to the specific facts of the case, as required by the European Court on Human Rights.

4. In the Lutsenko case the investigator gave him and his lawyer a "schedule" dictating which pages of the files they were to read every day in preparation of his defense, and only gave them access to the files they were instructed to review on that very day. The investigator did not take into consideration whether the defense lawyer had other obligations, which could keep him from preparing this case within the dictated time frame. The defense did not get his own copy of the files, and in neither the Lutsenko nor the Korniychuk cases were the defense allowed by the investigator to photograph or photocopy the files or parts thereof. The defense lawyer during his preparations and during the trial will only have his personal handwritten notes to support his memory.

As seen from point 3 above, the court even justified the detention of Lutsenko by the fact that he and his defense lawyer were too slow in reading through the files, thus delaying the trial and not respecting a procedural decision of the investigator.

It is unheard of and must be a violation of the European Convention Article 6, paragraph 3.b) that it is up to the decision of the investigator how and when the defendant and his lawyer are to prepare themselves for the upcoming trial. That can not be a procedural decision in the hands of the investigator or the prosecutor, but a right of the defendant and his lawyer.

It does not allow fair working conditions or equality of arms that the defense lawyer does not have his own copy of the file and access to all of the files simultaneously.

...

6. During the court session in the Lutsenko case on 25.2.2011 the chairman of the Court of Appeal informed the audience that he had received a written note from Mr. Lutsenko through his lawyer requesting that Mr. Lutsenko be present in the court room. The judge however turned this request down as the note was not "certified by the prison director". The court therefore had not requested Mr. Lutsenko to be brought from the Detention Center to the court building and the court session took place without defendant.

The court can have had no doubt that Mr. Lutsenko wanted to be present nor that the note, which it had received from the defendant's lawyer, was written by Mr. Lutsenko.

The decision indicates a biased attitude in the judiciary against granting the accused person his legal rights and letting him benefit from the assumption of innocence. That also seems to indicate a lack of understanding of or respect for one of the basic principles of human rights: Justice must not only be done but must also be seen to be done.

7. In the Lutsenko case the defense lawyer complained about having only received from the court a notice of the session, in which the question of extension of the detention was to be dealt with, 15 minutes before the meeting. With such a short notice he was unable to meet. The prosecutor claimed that the defense lawyer had been informed 1 hour before the meeting and that he himself had not known of the session earlier. In any case this is not a fair way for the court to inform the parties to the trial about a session, for which they need to prepare themselves and where it is essential that the persons with specific knowledge of the case can meet.

...

10. The Monitor was impressed by the widespread opinion that the Ukrainian courts cannot be considered independent at least in cases related to politics. The judiciary certainly has a problem with its credibility in the public. As the decisive factor of such situation the composition of the Higher Council of Justice was pointed at with its heavy bias in favour of the representation from the President of Ukraine or his affiliated party and the membership of the Prosecutor General and his 2 deputies, the Head of the Security Service etc. after the Judicial Reform in the summer of 2010. The judicial reform has in other ways improved the conditions of the legal system, but the Higher Council of Justice has obtained an unacceptable decisive influence on the appointment of, the disciplinary measures against and the dismissal of judges. The judicial reform law was criticized by the Council of Europe's Venice Commission.

11. According to a public statement by the Deputy Prosecutor General the prosecution last year initiated 600 disciplinary cases against judges and information indicates that at least 38 judges have been dismissed against an average of 6½ the former years. This is a strong indication that the independence of judges is under strong pressure and that the prosecution has a dominating influence on the future of judges. Prosecutors should not be responsible for disciplining judges; that disturbs the point of balance between prosecution and judiciary.

12. It has also been mentioned that judges are not appointed for an unlimited time until they have served for five years. Their first appointment is made by the President of Ukraine upon proposal of the Higher Council of Justice. After that period their permanent appointment is to be approved by the Parliament where one party and its allies hold a solid majority. That gives judges little room for political independence especially during those initial 5 years in the office.

...

14. The Monitor has been surprised to see a statement by the newly appointed Prosecutor General Viktor Pshonka that he considers himself to be a member of the team of the President and will fulfil his orders. One would rather expect him to express his loyalty to the law and his independence from the political life.

15. This corresponds to many statements about a history of political influence on the prosecution and the courts. Reportedly one of the main reasons for launching the case

against Mr. Lutsenko is to pay back for his actions as Minister of Interior against some of the persons who have now come to power.

...

17. It has also been mentioned by several persons that there is a tradition of leaving political investigations open and unconcluded for long periods, sometimes years. This practice can keep the defendants well occupied with meetings with the investigator, keeping them from other activities, and also serves as a Damocles sword to the defendants, knowing that the investigator or the prosecutor at any time can forward cases against them with grave consequences.

If the purpose of the investigation is to promote a political aim not protected by the law by prosecuting somebody for acts for which others are not being prosecuted, and thus not treat everybody equally according to the law, the justice is selective and therefore unfair. The charges raised against the former ministers seem to the experienced eye somewhat far-fetched and one would rather expect them to result in a political than a criminal responsibility, if any at all. This monitoring can not and can not be expected to answer with certainty the question of whether these cases are the result of selective justice. If so it however tells about the legal system and tradition of a country, not about the guilt or innocence of an individual. Selective justice and abuse of criminal justice system is a violation of Article 6 on Fair Trial of the European Convention on Human Rights and falls short of the country's international obligations to ensure respect for the rule of law principles.

Ukraine has been monitored by the Council of Europe as to the implementation of the commitments and obligations undertaken when joining that organization. The President of Ukraine issued on 10.1.2011 a decree according to which Ukraine is to fulfill its obligations towards CoE and established a mechanism to oversee it. This process should not be solely focused on the legislative reform. The main problems have been in the culture, tradition and implementation, on top of the outdated and deficient legislation itself (e.g. Ukrainian Criminal Procedure Code dates back to 1961 and its reform is long overdue).

Based on the above observations of the monitoring of the cases against Mr. Korniychuk and Mr. Lutsenko it can be concluded that it would be unwise to stop that monitoring now."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

49. The applicant complained under Article 5 § 1 (b) and (c) of the Convention that his arrest and detention had been arbitrary and not in accordance with law, reiterating the reasoning of his appeal against the decision of 27 December 2010 ordering his arrest (see paragraph 33 above). The applicant complained under Article 5 § 2 of the Convention that he had

not been informed promptly of the reasons for his arrest. He further complained under Article 5 § 3 of the Convention that the decision ordering his detention had not been substantiated and that he had been punished for exercising his constitutional rights not to make self-incriminating statements, to be considered innocent until proved guilty and to hold an opinion. He further complained that he had not been provided with the materials of the investigation which had been used in support of the application for his detention and that the court of appeal had disregarded his arguments in favour of his release. The applicant lastly complained under Article 6 §§ 1, 2 and 3 (a) and (b) of the Convention that he and his lawyer had not been informed in advance of the subject of the court hearing concerning the preventative measure applied to him and had not been given the necessary time and facilities to prepare his defence.

50. The Court reiterates that it views complaints before it as characterised by the facts alleged in them and not merely by the legal grounds or arguments relied on. Being master of the characterisation to be given in law to the facts of the case and having regard to the substance of the applicant's complaints under Article 6 of the Convention, the Court decides to examine them under the relevant provisions of Article 5 of the Convention.

The relevant provisions of Article 5 of the Convention read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so...
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. Admissibility

1. Exhaustion of domestic remedies

51. The Government made an objection to the applicant's complaints about his arrest on 26 December 2010. They noted that the applicant, being a suspect, could have asked the domestic courts, in accordance with Article 43-1 of the Code of Criminal Procedure, to review the lawfulness of his arrest and could have claimed damages should his detention have been found unlawful. The applicant, however, had failed to do so. The Government contended that this remedy had been effective both in theory and in practice. They submitted examples of domestic court decisions by which individuals had been awarded damages for their unlawful detention (see paragraphs 43-45 above).

52. The Government also pointed out that the court hearing of 27 December 2010 had dealt with the investigator's request for the custodial preventive measure to be applied to the applicant in the context of the first criminal case and, accordingly, it could not have involved the examination of the issue concerning the applicant's arrest in the context of the second criminal case.

53. The applicant considered that the examples from the domestic courts' practice were not comparable to his case, as in those cases the individuals had been released within a day after their arrests because the domestic authorities had found their arrests to be unlawful.

54. The applicant further noted that, under Article 106 of the Code of Criminal Procedure, a complaint of unlawful arrest required to be considered together with the investigator's application for the detention of the person concerned. Therefore, he considered that the hearing of 27 December 2010 had concerned both issues – the lawfulness of his arrest and the choice of custodial preventive measure.

55. The Court notes that the Government's objections are closely linked to the merits of the applicant's complaints under Article 5 §§ 1 and 3 of the Convention. It therefore joins them to the merits.

2. Otherwise as to admissibility

56. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Article 5 § 1 of the Convention

a. Parties' submissions

57. The applicant noted that the institution of the criminal proceedings in itself had not been sufficient to justify his deprivation of liberty. He maintained that his arrest had been conducted with numerous procedural violations and had not been justified. The case file had contained no specific evidence that the applicant had had any intention of escape and he could not have possibly continued any alleged criminal activities, as by the time of his arrest he had not been a member of the Government anymore.

58. The applicant further maintained that the first-instance court had failed to establish any evidence which would have shown the necessity of his detention between 26 and 27 December 2010 or thereafter. He considered that the grounds for his arrest which had been advanced by the prosecutor could not serve as sufficient and necessary grounds for deprivation of liberty.

59. He also maintained that upon committing him to trial on 23 May 2011 the Pechersky Court had prolonged his detention without fixing any time limit on it.

60. The Government asserted that the applicant's arrest fell within paragraph (c) of Article 5 § 1. They noted that the applicant had been arrested within the framework of the criminal proceedings instituted against him and that the domestic authorities had had a reasonable suspicion that he had committed a crime. They stressed again that the applicant could have challenged the lawfulness of his arrest before the courts if he had considered his arrest unlawful.

61. As to the decision ordering the applicant's detention given by the Pechersky Court on 27 December 2010, the Government contended that the domestic authorities had been better placed to assess the facts of the case and their decision to deprive the applicant of his liberty had been based on sufficient grounds, such as avoiding participating in procedural actions and not respecting decisions of the investigator, charges of serious crimes and the potential for the applicant to influence witnesses. They noted that the applicant had not appeared before the investigator in order to study the case file, although he had been obliged to do so under Article 135 of the Code of Criminal Procedure. The Government further submitted that the applicant's detention was necessary to ensure his participation in further investigative actions. Furthermore, in his interview with the weekly newspaper *Zerkalo Nedeli*, the applicant had characterised witness K. negatively. In addition, his statements had thereby put pressure on the said witness and had disclosed information about the investigation. The Government further

noted that the protection of witnesses had been the most important consideration in deciding on the applicant's detention and this ground had been persistent both on investigative and judicial stages of the case to ensure proper administration of justice by receiving the witness testimonies without any obstacles. The Government concluded that the applicant's deprivation of liberty had been based on the law, had been ordered by a court and had been free from any arbitrariness.

b. The Court's assessment

i. The applicant's arrest

62. The Court emphasises that Article 5 of the Convention guarantees the fundamental right to liberty and security, which is of primary importance in a "democratic society" within the meaning of the Convention. All persons are entitled to the protection of that right, that is to say, not to be deprived, or to continue to be deprived, of their liberty, save in accordance with the conditions specified in Article 5 § 1. The list of exceptions set out in the aforementioned provision is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely, to ensure that no one is arbitrarily deprived of his or her liberty (see *Khayredinov v. Ukraine*, no. 38717/04, § 26, 14 October 2010, with further references). No detention which is arbitrary can be compatible with Article 5 § 1, the notion of "arbitrariness" in this context extending beyond a lack of conformity with national law. As a consequence, a deprivation of liberty which is lawful under domestic law can still be arbitrary and thus contrary to the Convention, in particular where there has been an element of bad faith or deception on the part of the authorities (see *Mooren v. Germany* [GC], no. 11364/03, §§ 72, 77 and 78, 9 July 2009, with further references) or where such deprivation of liberty was not necessary in the circumstances (see *Nešťák v. Slovakia*, no. 65559/01, § 74, 27 February 2007).

63. Turning to the facts of the present case, the Court notes that the applicant was arrested within the framework of the second criminal case and was taken to a court on the next day. However, the court did not examine the lawfulness of the applicant's arrest and, according to the Government, which in fact insisted on this point, had not intended to do so. The relevant facts also confirm that the prosecuting authorities took the applicant to the court solely for examination of their application for the applicant's detention in connection with the first criminal case and effectively opposed any examination of the lawfulness of the applicant's arrest during the hearing of 27 December 2010. Such behaviour on the part of the domestic authorities strongly suggests that the purpose of the applicant's arrest was not to bring him before a competent legal authority within the same criminal case, but to ensure his availability for examination of the application for a change of

preventive measure to a custodial one in a different set of criminal proceedings.

64. Furthermore, the applicant's arrest does not appear to have been "necessary to prevent him from committing an offence or fleeing after having done so". It is true that the order for the applicant's arrest indicated among the reasons therefor the prevention of his avoiding participating in the investigation and of his continuing criminal activities, however the authorities failed to explain in what way the applicant, being accused of abuse of office, could continue this type of activity almost a year after he had left the office of Minister of the Interior. Concerning the necessity to ensure the applicant's participation in further investigative actions, the Government submitted that the resumption of the investigation had been necessary to consolidate two criminal cases against the applicant (see paragraph 25 above). They did not claim however that any such actions within the first criminal case had been necessary or had been eventually conducted. As to the risk of fleeing, the applicant was under an obligation not to abscond which he had given to the very same investigator, V., who had arrested him and who did not appear to have any previous complaints concerning the applicant's compliance with the said obligation.

65. The Court therefore concludes that the applicant's arrest was made for another purpose than that indicated in Article 5 § 1 of the Convention and was therefore arbitrary and contrary to this provision. It follows that there has been a violation of Article 5 § 1 of the Convention in this respect.

ii. The applicant's ensuing detention

66. Having established that the applicant's arrest was contrary to Article 5 § 1 of the Convention, the Court will next examine the compliance of the applicant's ensuing pre-trial detention with the requirements of this provision. In this respect, the Court reiterates that detention pursuant to Article 5 § 1 (c) must embody a proportionality requirement (see *Ladent v. Poland*, no. 11036/03, § 55, 18 March 2008). For example, in the case of *Ambruszkiewicz v. Poland* (no. 38797/03, §§ 29-32, 4 May 2006) the Court examined whether the applicant's placement in custody was strictly necessary to ensure his presence at trial and whether other, less stringent, measures could have been sufficient for that purpose.

67. In the present case, the decision of the domestic court ordering the applicant's detention was based on grounds which, in the Court's opinion, are in themselves questionable. In this respect, the Court observes that the principal reasons advanced by the prosecution to deprive the applicant of his liberty were the investigator's dissatisfaction with the applicant's behaviour in studying the case file, the applicant's interviews with the media and his unwillingness to testify and to admit his guilt, as well as charges of committing serious crimes.

68. As to the applicant's manner of studying the case file, which could potentially affect the length of the proceedings, the Court first recalls its own well-established case-law, which identifies the behaviour of the parties to court proceedings as one of the key factors in assessing the reasonableness of the length of such proceedings (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII). In particular, if an applicant complains that the proceedings lasted for an unreasonably long time the Court will normally deduct any period during which the delay is attributable to the applicant (see, for example, *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 81, ECHR 2003-IX (extracts); and *Jehovah's Witnesses of Moscow v. Russia*, no. 302/02, § 198, 10 June 2010). On the other hand, any such delay could affect the interests of other parties and the authorities should have the means to discipline the person responsible. The Court is not persuaded, however, that deprivation of liberty in such a situation is an adequate response to the problem of delay in studying a case file. Moreover, the circumstances of the present case show that the investigator decided to apply such a drastic measure to the applicant after only ten days of studying the case file.

69. The Court further notes the applicant's submissions made at the domestic level and repeated before this Court, namely that this ground for his detention was in contradiction with the provisions of domestic law, which provided in particular that study of a case file is a right and not an obligation of an accused and that the time available to an accused for study of the case file should not be limited (Articles 142 and 248 of the Code of Criminal Procedure, see paragraph 42 above). The domestic courts, however, did not examine these submissions and did not assess to what extent the manner in which the investigator presented the case file to the applicant had complied with the requirements of the aforementioned Article 248 of the Code.

70. The next ground for the applicant's detention was alleged pressure put on a witness through the applicant's interviews with the media. The Government argued that protection of witnesses had been the most important consideration in deciding on the applicant's detention. The Court notes, however, that neither the domestic authorities nor the Government themselves explained in what way the witnesses had been actually threatened by the applicant's public statements and why the detention could be considered an adequate response to such statements. It appears that this ground was stated by the investigating authorities in the broader context of their dissatisfaction with the applicant's presentation to the media of his opinion concerning the criminal proceedings against him. The Court considers that, being a prominent political figure, the applicant could be expected to express his opinion on this matter and that this would interest both his supporters and opponents.

71. Although freedom of expression is not absolute and may be restricted, any such restriction should be proportionate. In this respect the Court reiterates that the imposition of a prison sentence for a media-related offence will be compatible with freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in cases of hate speech or incitement to violence (see, *mutatis mutandis*, *Mahmudov and Agazade v. Azerbaijan*, no. 35877/04, § 50, 18 December 2008, and *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 115, ECHR 2004-XI). The Court considers that in the circumstances of the instant case there was no justification for the deprivation of the applicant's liberty for exercising his freedom of speech which did not constitute any offence.

72. The further grounds for the applicant's detention, namely failure to testify and admit his guilt, by their nature run contrary to such important elements of the fair trial concept as freedom from self-incrimination and the presumption of innocence. In the context of choice of whether or not to impose a custodial preventive measure, the advancing of such grounds appears particularly disturbing as they indicate that a person may be punished for relying upon his basic rights to a fair trial. The Court is also concerned with the fact that the domestic courts agreed with such grounds in ordering and upholding the applicant's detention.

73. Finally, ordering further detention without fixing any time-limit on it has been found in the Court's case-law to be contrary to the requirements of Article 5 § 1 (c) (see *Kharchenko v. Ukraine*, no. 40107/02, § 98, 10 February 2011).

74. In the light of the above, the Court concludes that the applicant's ensuing detention has been in violation of Article 5 § 1 of the Convention too.

2. Article 5 § 2 of the Convention

a. Parties' submissions

75. The applicant complained that at the time of his arrest he had not been informed of the reasons for his arrest and he had not been allowed to read the charge sheet concerning his arrest. He also stressed that he had not signed the charge sheet, considering his arrest not to be in conformity with the relevant procedural rules. He maintained that the investigator had not informed him of the grounds for the deprivation of his liberty, had not allowed him to contact his lawyer and had not drawn up a proper arrest report. According to the applicant, the investigator had done so intentionally in order to prevent him from exercising his right to challenge the lawfulness of his arrest in court.

76. The Government maintained that on 26 December 2010 the applicant had been arrested at 12.45 a.m. and less than an hour later he had been served with a copy of the investigator's decision of 24 December 2010 to institute the second set of criminal proceedings against him. According to them, the applicant had refused to sign the record on receipt of the copy of the aforementioned decision, which had been witnessed by two witnesses. The Government concluded that the applicant had been informed of the reasons for his arrest without undue delay.

b. The Court's assessment

77. The Court reiterates that Article 5 § 2 of the Convention contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. By virtue of this provision any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness (see, among recent authorities, *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, § 208, 21 April 2011). In case of several concurring investigations, the authorities shall provide the person concerned with at least a minimum of information about each of them, if the materials from those investigations can serve as a basis for his detention (see *Leva v. Moldova*, no. 12444/05, § 61, 15 December 2009).

78. Turning to the circumstances of the present case, the Court notes that it is in dispute between the parties whether and to what extent the applicant was informed of the formal reasons for his arrest. However, it is not disputed by the Government that at the time of his arrest on 26 December 2010 the applicant was not informed of the existing application for his detention prepared by the GPO on 25 December 2010. The Court considers that this particular event was pertinent to the applicant's detention and ultimately served as a basis for his detention. In fact, the applicant only came to be informed of the prosecutor's application of 25 December during the court hearings that took place on 27 December 2010, more than twenty hours after his arrest.

79. The foregoing considerations are sufficient to enable the Court to conclude that the authorities did not comply with their obligations under Article 5 § 2 of the Convention. There has accordingly been a violation of this provision.

3. Article 5 § 3 of the Convention

a. Parties' submissions

80. The applicant considered that the detention proceedings before the first-instance court had been unfair. The court had refused to hold a hearing

on the lawfulness of his arrest and had denied him time to prepare his arguments against the application of the investigator for his detention.

81. The Government repeatedly stressed that the court proceedings of 27 December 2010 had not been related to the applicant's arrest of 26 December 2010 and reiterated that the applicant could have challenged his arrest by bringing proceedings himself if he had considered it unlawful.

82. They further noted that the proceedings concerning the application for replacement of the preventive measure from an obligation not to abscond with pre-trial detention had met the requirements of Article 5 § 3. The applicant had been represented by a lawyer and at the beginning of the hearing the court had explained which case was under examination. The prosecutor had read out the application for the applicant's arrest, which had not contained any information that could not have been known to the applicant, as this information had concerned his own behaviour. The Government also noted that during the hearing the applicant had put forward the motions which he had considered necessary and the court had duly examined them. In particular, the court had rejected the applicant's motion to postpone the hearing in order to collect documents in respect of the applicant's personal situation, as it had considered that the information provided by the applicant in this respect was not contested and therefore could be accepted without supporting documents. The Government further mentioned that during the hearing the applicant's lawyer had claimed that he had been in possession of documents which could refute the prosecutor's arguments but he had failed to specify them. However, in his appeal the applicant's lawyer had only presented documents concerning the applicant's personal situation, references from different institutions and a request for bail. All of those submissions had been already examined and taken into consideration by the first-instance court.

83. The Government concluded that the applicant had been brought before a judge as required by Article 5 § 3 and that the proceedings of 27 December 2010 had been in conformity with the requirements of the aforementioned provision.

84. In their oral submissions they further noted that given that the domestic court had decided on the applicant's detention within the framework of the first criminal case, it was inexpedient and pointless to choose the same preventive measure within the second set of criminal proceedings against the applicant. Furthermore, on 29 December 2010 both criminal cases were joined.

b. The Court's assessment

i. Review of the lawfulness of the applicant's arrest

85. The Court reiterates that one of the requirements of Article 5 § 3 is that judicial control of detention must be automatic. It cannot be made to

depend on a previous application by the detained person. Such a requirement would not only change the nature of the safeguard provided for under Article 5 § 3, a safeguard distinct from that found in Article 5 § 4, which guarantees the right to institute proceedings to have the lawfulness of detention reviewed by a court. It might even defeat the purpose of the safeguard under Article 5 § 3, which is to protect the individual from arbitrary detention by ensuring that an act of deprivation of liberty is subject to independent judicial scrutiny (see *Aquilina v. Malta* [GC], no. 25642/94, § 49, ECHR 1999-III).

86. In the circumstances of the present case it should be noted that following the applicant's arrest he was brought before a court. That court, despite the applicant's complaint of unlawful arrest, did not examine the lawfulness of the applicant's detention and, as the Government maintained, was not supposed to examine it. Furthermore, it does not appear from the case-file materials and the Government's submissions that the authorities had any intention of ensuring that the applicant was afforded the automatic judicial control of his detention required by Article 5 § 3. In the Court's opinion, the domestic courts' decisions referred to by the Government (see paragraphs 43-45 and 51 above) are of no relevance to the applicant's situation. Therefore, the Court concludes that the applicant was denied the important safeguard of this Convention provision.

87. For the reasons stated above, the Government's objection based on the argument that it was for the applicant to seek the review of the lawfulness of his arrest should be rejected.

88. The Court accordingly rejects the Government's objection and concludes that there had been a violation of Article 5 § 3 of the Convention.

ii. Judicial order for the applicant's detention

89. The Court observes that the applicant's detention in the present case falls within the ambit of Article 5 § 1 (c). In such a situation, when the lawfulness of detention pending investigation and trial is examined, a hearing is normally required. Furthermore, the proceedings must be adversarial and must always ensure equality of arms between the parties – the prosecutor and the detainee. This means, in particular, that the detainee should have access to the documents in the investigation file which are essential for assessing the lawfulness of his detention. The detainee should also have an opportunity to comment on the arguments put forward by the prosecution (see *Lebedev v. Russia*, no. 4493/04, § 77, 25 October 2007, with further references).

90. In the circumstances of the present case, the Court has already established that the applicant and his lawyer were not informed in advance about the subject of the hearing (see paragraph 77 above). The Court has further observed that in its decision ordering the applicant's detention the first-instance court did not examine the necessity of the applicant's

deprivation of liberty in a satisfactory manner (see paragraphs 66 to 74 above). Furthermore, the domestic court did not consider the possibility of using measures other than deprivation of liberty, although the applicant's lawyer did lodge a request for bail. In addition to those shortcomings, the applicant's request to be afforded appropriate time to study the materials brought forward by the prosecution and to prepare his defence was refused without any justification. The Court cannot accept the Government's argument that the applicant did not need to review the materials supporting the prosecutor's application as he was aware of the facts described in the said application. It was for the applicant and his lawyer, and not the authorities, to decide whether or not he needed to study the materials provided in support of his arrest. Such behaviour by the domestic authorities seriously affected the equality of arms between the parties.

91. The Court therefore concludes that the proceedings concerning the change of preventive measure applied to the applicant did not comply with the requirements of Article 5 § 3 and that there has also been a violation of this provision in this respect.

4. Article 5 § 4 of the Convention

92. The applicant maintained that he had been denied access to the documents presented by the prosecution in support of their application for his detention and that the court of appeal had not explained in its decision the reasons for refuting his arguments.

93. The Government maintained that the applicant had had an effective appeal procedure against the order for his detention and he had availed himself of that remedy. The Government also disagreed with the applicant's contention that he had been denied access to the materials presented in support of his detention, as he had not lodged any motion for such access.

94. The Government considered that the court of appeal had properly assessed all the arguments made by the applicant and his complaints of procedural violations. They noted that the first-instance court had examined the applicant's submissions and complaints and had rejected them and the court of appeal had upheld the decision of the first-instance court, having agreed with its findings and having examined whether the decision of 27 December 2010 had been adopted in violation of criminal procedural law. Therefore, the Government considered that the Kyiv City Court of Appeal had properly assessed all of the applicant's arguments and that there had not been a violation of the applicant's rights under Article 5 § 4 of the Convention in the present case.

95. The Court reiterates that Article 5 § 4 of the Convention entitles arrested or detained persons to a review of the procedural and substantive conditions which are essential for the "lawfulness", in Convention terms, of the deprivation of their liberty. This means that the competent court has to examine not only compliance with the procedural requirements of domestic

law, but also the reasonableness of the suspicion underpinning the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention (see *Butkevičius v. Lithuania*, no. 48297/99, § 43, ECHR 2002-II, and *Solovey and Zozulya v. Ukraine*, nos. 40774/02 and 4048/03, § 70, 27 November 2008).

96. The requirement of procedural fairness under Article 5 § 4 does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. Although it is not always necessary that an Article 5 § 4 procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question. Thus, the proceedings must be adversarial and must always ensure "equality of arms" between the parties (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 203 - 204, ECHR 2009-.... with further references). Equality of arms is not ensured if the defending party is denied access to those documents which are essential in order to raise an effective challenge to the lawfulness of his detention (see, *mutatis mutandis*, *Fodale v. Italy*, no. 70148/01, § 41, ECHR 2006-VII). It may also be essential that the individual concerned should not only have the opportunity to be heard in person but that he should also have the effective assistance of his lawyer (see *Bouamar v. Belgium*, 29 February 1988, § 60, Series A no. 129).

97. In the present case, the applicant appealed against the decision ordering his detention and made a number of complaints challenging both the fairness of the procedure before the first-instance court and the grounds for his arrest advanced by the prosecution and endorsed by that court (see paragraph 33 above). In its decision of 5 January 2011 the Kyiv Court of Appeal rejected the applicant's appeal without giving a proper reply to his arguments, which in the Court's opinion appear to be pertinent and worthy of appropriate examination and substantive reply. Neither did it give an adequate response to the request signed by the Members of Parliament and supported by the Ombudsman for the applicant's release on bail. The domestic court, however, limited itself to repeating the reasoning of the first-instance court and rejecting the applicant's complaints as unsubstantiated.

98. The Court also notes that in its further decision of 21 April 2011 the same court of appeal prolonged the applicant's detention, even though the applicant had completed his study of the case-file materials, which had been the principal reason advanced by the investigating authorities for deprivation of the applicant's liberty.

99. The foregoing considerations are sufficient to enable the Court to conclude that the applicant was not afforded proper judicial review of the lawfulness of his detention.

There has accordingly been a violation of Article 5 § 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 5

100. In his submissions to the Court, the applicant complained that the proceedings against him and his arrest were used by the authorities to exclude him from political life and from participation in upcoming parliamentary elections. The applicant did not refer to any Convention provision. The Court considers that this complaint shall be considered under Article 18 of the Convention, which provides:

> "The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

A. Parties' observations

101. The Government considered that this provision was not applicable in the present case, given that the applicant's deprivation of liberty had been effected for the sole purpose of Article 5. They further noted that the applicant did not invoke Article 18 in his application to the Court and the only allegation of possible political pressure had been made by the applicant in his request for priority. They noted that the applicant made only general remark about hypothetical pressure on him and therefore this issue cannot be considered by the Court. They further reiterated that the status of a politician could not grant him or her immunity from criminal prosecution. The Government observed that the applicant had been deprived of his liberty in connection with the criminal proceedings instituted against him. The criminal offences with which he had been charged were defined in the relevant provisions of the Criminal Code. The prosecuting authorities had conducted an investigation in connection with the suspicion that the applicant had committed serious crimes and, as a result, more than forty-seven volumes comprising the criminal case file, together with the indictment, had been forwarded by the prosecuting authorities to the court. On 23 May 2011 the court had held a preliminary hearing in the criminal case against the applicant. Furthermore, the applicant's behaviour during the period when he was at large had given sufficient grounds to believe that he had been attempting to influence the investigation and to obstruct the establishment of the truth in the case. Therefore, the Government considered that the purposes behind the deprivation of the applicant's liberty had been exclusively those envisaged by Article 5 § 1 (c) of the Convention.

102. They reiterated that the fact of the applicant's active political life and his submissions of numerous breaches of procedural legislation which had allegedly been committed by the domestic authorities in the proceedings against him and referred to in his application to the Court could not as such form the basis of an argument that the restriction on his Convention rights had been imposed for ulterior purposes. The Government noted that apart from the aforementioned facts, there was no evidence that the reason for the applicant's detention had been his activities as a political figure and a member of the party in opposition to the Government as opposed to the existing suspicion of his having committed a crime. The Government, therefore, considered this complaint unsubstantiated in view of the lack of evidence suggesting that the domestic authorities, in deciding to deprive the applicant of his liberty, had proceeded on the basis of political motives.

103. The applicant submitted that he had been a professional politician for the past twenty years. He was considered as one of two of the most prominent opposition leaders. The accusations against him were related to his political activities as a Minister of the Interior and did not indicate any personal benefits in his actions. The applicant noted that the media was full of pictures of him behind bars, which was done to plant in the public opinion the idea that he was a dangerous criminal. He further referred to the prosecution of the opposition by those in power, which had been noted by many domestic and international observers.

B. The Court's assessment

104. The Court will first examine the Government's objections. The Court notes that the circumstances of the case suggest that soon after the change of power, the applicant, who was one of the former Government ministers and the leader of the popular political party, had been accused of abuse of power and prosecuted. This happened in the context, which the external observers described as politically motivated prosecution of the opposition leaders. The applicant's case, along with the case of the former Prime-Minister Tymoshenko, attracted important attention both nationally and internationally. In these circumstances, the applicant's submissions made at the initial stage as to the possible political pressure on him before the upcoming elections, as well as his complaint that one of the reasons for his detention had been his communication with the media and his public disagreement with the accusations against him, are sufficient reasons to examine the issue of the applicant's detention from the viewpoint of Article 18. Therefore, the Court concludes that in his factual and legal submissions the applicant raised in substance the complaint that his arrest and detention had had ulterior motives.

105. The Court notes in this respect that Article 18 of the Convention does not have an autonomous role and can only be applied in conjunction

with other Articles of the Convention (*Gusinskiy v. Russia*, no. 70276/01, § 75, ECHR 2004-IV). In the light of the foregoing, the Court will consider the applicant's allegations under Article 18 of the Convention in conjunction with his complaints under Article 5 of the Convention, cited above.

106. The Court reiterates that the whole structure of the Convention rests on the general assumption that public authorities in the member States act in good faith. Indeed, any public policy or an individual measure may have a "hidden agenda", and the presumption of good faith is rebuttable. However, an applicant alleging that his rights and freedoms were limited for an improper reason must convincingly show that the real aim of the authorities was not the same as that proclaimed (or as can be reasonably inferred from the context). A mere suspicion that the authorities used their powers for some other purpose than those defined in the Convention is not sufficient to prove that Article 18 was breached. Furthermore, high political status does not grant immunity (*Khodorkovskiy v. Russia*, no. 5829/04, §§ 255 and 258, 31 May 2011).

107. When an allegation under Article 18 is made, the Court applies a very exacting standard of proof. As a consequence, there are only few cases where a breach of that Convention provision has been found. Thus, in *Gusinskiy v. Russia* (cited above, § 73–78), the Court accepted that the applicant's liberty had been restricted, *inter alia*, for a purpose other than those mentioned in Article 5. The Court in that case based its findings on an agreement signed between the detainee and a federal Minister for the Press. It was clear from that agreement that the applicant's detention had been applied in order to make him sell his media company to the State. In *Cebotari v. Moldova* (no. 35615/06, §§ 46 et seq., 13 November 2007) the Court found a violation of Article 18 of the Convention in circumstances where the applicant's arrest was visibly linked to an application pending before the Court.

108. The Court notes that when it comes to allegations of political or other ulterior motives in the context of criminal prosecution, it is difficult to dissociate the pre-trial detention from the criminal proceedings within which such detention had been ordered. The circumstances of the present case suggest, however, that the applicant's arrest and detention, which were ordered after the investigation against the applicant had been completed, had their own distinguishable features which allow the Court to look into the matter separately from the more general context of politically motivated prosecution of the opposition leader. In the present case, the Court has already established that the grounds advanced by the authorities for the deprivation of the applicant's liberty were not only incompatible with the requirements of Article 5 § 1 but were also against the spirit of the Convention (see paragraphs 66 to 73 above). In this context, the Court observes that the profile of the applicant, one of the opposition leaders who

had communicated with the media, plainly attracted considerable public attention. It can also be accepted that being accused of abuse of office, he had the right to reply to such an accusation through the media. The prosecuting authorities seeking the applicant's arrest explicitly indicated the applicant's communication with the media as one of the grounds for his arrest and accused him of distorting public opinion about crimes committed by him, discrediting the prosecuting authorities and influencing the upcoming trial in order to avoid criminal liability (see paragraph 26 above).

109. In the Court's opinion, such reasoning by the prosecuting authorities clearly demonstrates their attempt to punish the applicant for publicly disagreeing with accusations against him and for asserting his innocence, which he had the right to do. In such circumstances, the Court cannot but find that the restriction of the applicant's liberty permitted under Article 5 § 1 (c) was applied not only for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, but also for other reasons.

110. There has accordingly been a violation of Article 18 of the Convention taken in conjunction with Article 5.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

111. 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

112. The applicant claimed that he sustained non-pecuniary damage, but left it to the Court's discretion to fix the appropriate amount of compensation.

113. The Government considered that the applicant's claim ought to be rejected as lacking in specification and unsubstantiated.

114. The Court, deciding in equity, awards the applicant 15,000 euros (EUR) in respect of non-pecuniary damage.

B. Costs and expenses

115. The applicant made no claim under this head. Accordingly the Court makes no award.

C. Default interest

116. 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. *Joins to the merits* the Government's objection concerning exhaustion of domestic remedies, and rejects it after an examination on the merits;

2. *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 5 § 1 of the Convention on account of the applicant's arrest;

4. *Holds* that there has been a violation of Article 5 § 1 of the Convention on account of the applicant's ensuing detention;

5. *Holds* that there has been a violation of Article 5 § 2 of the Convention;

6. *Holds* that there has been a violation of Article 5 § 3 of the Convention as regards the applicant's right to "be brought promptly before a judge" following his arrest;

7. *Holds* that there has been a violation of Article 5 § 3 of the Convention on account of the applicant's detention;

8. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

9. *Holds* that there has been a violation of Article 18 of the Convention taken in conjunction with Article 5;

10. *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 Ukrainian hryvnias 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.

Done in English, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 3 July 2012.

Claudia Westerdiek
Registrar

Dean Spielmann
President