



Ukrainian opposition leader was arbitrarily arrested and detained

In today's Chamber judgment in the case of [Lutsenko v. Ukraine](#) (application no. 6492/11), which is not final¹, the European Court of Human Rights held, unanimously, that there had been:

two violations of Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights on account of Mr Lutsenko's arrest and ensuing detention;

a violation of Article 5 § 2 (right to be informed of the reasons for one's arrest);

two violations of Article 5 § 3 (right to be brought promptly before a judge) on account of both his arrest and his pre-trial detention;

a violation of Article 5 § 4 (right to challenge the lawfulness of one's detention); and

a violation of Article 18 (limitation on use of restrictions on rights) in conjunction with Article 5.

The case concerned the complaint by a well-known opposition politician that his arrest and the decision on his detention were arbitrary and unlawful, and that he was not informed about the reasons for his arrest.

The Court held in particular: that Mr Lutsenko's arrest had been arbitrary; that no valid reasons had been given for his detention; that he had not been duly informed of the reasons for his detention; and, that the lawfulness of his arrest and detention had not been properly reviewed.

The Court also found that, given that the prosecutors had referred to Mr Lutsenko's communication with the media as one of the reasons for his arrest, his right to liberty had been restricted for other reasons than those permissible under Article 5.

Principal facts

The applicant, Yuriy Vitaliyovych Lutsenko, is a Ukrainian national who was born in 1964 and is currently detained in Kyiv. He is the leader of the opposition party Narodna Samooborona and was the Minister of the Interior until January 2010.

In November 2010, the General Prosecutor's Office brought criminal proceedings against Mr Lutsenko for unlawfully arranging different work-related benefits for his driver. On 11 December of the same year, the prosecution brought another criminal case against Mr Lutsenko for abuse of office, for allegedly arranging the allocation of a one-room apartment to his driver. The two criminal cases were joined ("the first criminal case").

¹ Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

On 13 December 2010 the prosecutor completed the investigation, formally indicted Mr Lutsenko and invited him to study the case file, which he did on several occasions between 15 and 23 December 2010.

On 24 December 2010 the General Prosecutor's Office brought another set of criminal proceedings against Mr Lutsenko for abuse of office ("the second criminal case"). He was suspected of the unlawful authorisation of search and seizure activities against an individual.

On 26 December 2010, Mr Lutsenko was arrested near his home by officers of the Security Service and the investigator of the General Prosecutor's Office in connection with the second criminal case. According to Mr Lutsenko, he was not informed of the reasons for his arrest and was not given a copy of the charges against him.

On 27 December 2010 Mr Lutsenko and his lawyer attended a hearing before the Pechersky court, which they had found out about only 20 minutes before it started. The hearing concerned the prosecutor's request to keep Mr Lutsenko in detention pending his trial in the first criminal case. According to Mr Lutsenko, he only discovered after the hearing had started that it did not concern his arrest the day before, as he had assumed. The court allowed the prosecutor's request and ordered Mr Lutsenko's detention, accepting the reasoning according to which Mr Lutsenko and his lawyer had studied the case file slowly and had given information about it to the media. The court also found that Mr Lutsenko had tried to prevent the investigation and was capable of influencing it, and had not admitted his guilt.

Mr Lutsenko's lawyer appealed unsuccessfully. Mr Lutsenko remains in detention. On 27 February 2012, he was convicted and sentenced to four years' imprisonment and confiscation of property. The judgment was upheld on appeal on 16 May 2012. An appeal in cassation is pending.

Complaints, procedure and composition of the Court

Relying on Article 5 §§ 1 (b) and (c), 2 and 3 (right to liberty and security) of the European Convention on Human Rights, Mr Lutsenko complained in particular that his arrest and detention were arbitrary and unlawful, and that he was not informed about the reasons for his arrest. Relying also on Article 6 §§ 1, 2 and 3 (a) and (b) (right to a fair trial), he complained that he was not informed in advance about the subject of the court hearing of 27 December 2010.

The application was lodged with the European Court of Human Rights on 21 January 2011. The Court communicated the application to the Ukrainian Government in April 2011, asking it to reply to a number of questions, including whether Mr Lutsenko had been detained for a purpose other than those envisaged in Article 5, contrary to Article 18, given his active participation in political life in Ukraine and his opposition to the Government. A Chamber hearing was held on 17 April 2012.

Judgment was given by a Chamber of seven judges, composed as follows:

Dean **Spielmann** (Luxembourg), *President*,
Mark **Villiger** (Liechtenstein),
Karel **Jungwiert** (the Czech Republic),
Boštjan M. **Zupančič** (Slovenia),
Ann **Power-Forde** (Ireland),
Ganna **Yudkivska** (Ukraine),
André **Potocki** (France),

and also Claudia **Westerdiek**, *Section Registrar*.

Decision of the Court

Having regard to the substance of Mr Lutsenko's complaints under Article 6, the Court decided to examine them under the relevant provisions of Article 5.

Article 5 § 1 (arrest)

Mr Lutsenko had been arrested within the framework of the second criminal case and had been taken to court on the following day. However, the Ukrainian court had not examined the lawfulness of his arrest, as the hearing had only concerned the application for his detention in connection with the first criminal case and the prosecuting authorities had opposed the examination of the lawfulness of his arrest. This suggested that the purpose of that arrest had not been to bring him before a competent legal authority in respect of the same criminal case within the meaning of Article 5 § 1.

Furthermore, Mr Lutsenko's arrest had not been "necessary to prevent him from committing an offence or fleeing after having done so" for the purpose of Article 5 § 1. In particular, the authorities had failed to explain how, being accused of abuse of office, he could have continued that type of activity almost a year after he had left the office of Minister of the Interior. As to the risk of fleeing, Mr Lutsenko had been under an obligation not to abscond which he had given to the investigator who had arrested him and who had not apparently had any complaints concerning Mr Lutsenko's compliance with the obligation. The Court concluded that Mr Lutsenko's arrest had been arbitrary and therefore in violation of Article 5 § 1.

Article 5 § 1 (detention)

The Court found that the grounds on which the decision of the Ukrainian court ordering Mr Lutsenko's pre-trial detention had been based were questionable. As regards the argument that Mr Lutsenko had studied the case file slowly, the Court noted that a delay caused by one of the parties to court proceedings could affect the interests of other parties and that the authorities should have the means to discipline the person responsible. However, the Court was not persuaded that deprivation of liberty in such a situation was an adequate response. Moreover, Mr Lutsenko's submissions showed that this ground for his detention was in contradiction with Ukrainian law, which provided that studying a case file was a right and not an obligation of an accused and that the time available to an accused to study the case file should not be limited.

As regards the argument that Mr Lutsenko had put pressure on a witness by giving interviews in the media, the Court noted that the Ukrainian Government had not explained how those interviews had been threatening to witnesses and why detention could be considered an adequate response to such pressure. Being a prominent political figure, Mr Lutsenko could be expected to express his opinion on the proceedings and it was likely that this would interest both his supporters and opponents. The Court considered that in the circumstances of the case there had been no justification for depriving Mr Lutsenko of his liberty for exercising his freedom of speech, which did not constitute any offence.

Finally, advancing Mr Lutsenko's failure to admit his guilt as a ground for his detention ran contrary to the elements which made up the concept of a fair trial, such as freedom from self-incrimination and the presumption of innocence. The fact that the Ukrainian courts had relied on those grounds was disturbing, as it indicated that a person might be punished for relying on his basic rights to a fair trial. Moreover, the courts had fixed no time-limits for his detention. The Court concluded that Mr Lutsenko's pre-trial detention had been in violation of Article 5 § 1.

Article 5 § 2

It was in dispute between the parties whether and to what extent Mr Lutsenko had been informed of the formal reasons for his arrest. However, it was not disputed by the Government that - at the time of his arrest on 26 December 2010 - he had not been informed of the existing application for his detention prepared by the prosecutor's office in relation to the first criminal case, which ultimately served as a basis for his detention. Mr Lutsenko had only been informed of that application during the court hearing on 27 December 2010, more than 20 hours after his arrest. The Court concluded that the authorities had not complied with their obligations under Article 5 § 2. There had accordingly been a violation of that Article.

Article 5 § 3

Despite Mr Lutsenko's complaint of having been arrested unlawfully, the Ukrainian court had not examined the lawfulness of his detention. From the materials in the case file the authorities had not apparently had any intention of ensuring that he was afforded the automatic judicial control of his detention required by Article 5 § 3. There had thus been a violation of Article 5 § 3 in that respect.

As regards the judicial order for Mr Lutsenko's detention, the Court had already established that he had not been informed in advance of the subject of the hearing and that the necessity of his deprivation of liberty had not been examined in a satisfactory manner by the Ukrainian court. Furthermore, that court had not considered the possibility of using measures other than deprivation of liberty. In addition to those shortcomings, Mr Lutsenko's request to be afforded appropriate time to study the materials brought forward by the prosecution and to prepare his defence had been refused without any justification. The Court concluded that the proceedings concerning his detention had not complied with the requirements of Article 5 § 3. There had accordingly been another violation of that article.

Article 5 § 4

The appeal court had rejected Mr Lutsenko's appeal without giving a proper reply to his arguments to the effect, in particular, that he had not violated his obligation not to abscond, that studying the case file was his right and not an obligation and that he had not known the grounds for the arrest well in advance of the hearing. Furthermore, that court had not given an adequate response to a request by a number of Members of Parliament, supported by the Ukrainian Ombudsman, for Mr Lutsenko's release on bail. The Court concluded that Mr Lutsenko had not been afforded a proper judicial review of the lawfulness of his detention. There had accordingly been a violation of Article 5 § 4.

Article 18

In his submissions to the Court, Mr Lutsenko had complained, without referring to any particular article of the Convention, that the proceedings against him and his arrest had been used by the authorities to exclude him from political life and from participation in the upcoming parliamentary elections. The Court considered that that complaint should be examined under Article 18.

Given that he was one of the opposition leaders, it was clear that Mr Lutsenko's case had attracted considerable attention. Being accused of abuse of office, he had the right to reply to such an accusation via the media. The prosecuting authorities had indicated his communication with the media as one of the grounds for his arrest. They had accused him of distorting public opinion concerning the offences with which he had been charged, of discrediting the prosecuting authorities and of influencing the upcoming trial in order to avoid criminal liability.

In the Court's opinion, such reasoning clearly demonstrated the authorities' attempt to punish Mr Lutsenko for publicly disagreeing with accusations against him and for asserting his innocence. The Court could not but find that the restriction on his liberty had been imposed 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. There had accordingly been a violation of Article 18 taken in conjunction with Article 5.

Just satisfaction (Article 41)

The Court held that Ukraine was to pay Mr Lutsenko 15,000 euros (EUR) in respect of non-pecuniary damage.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.