

Former Prime Minister of Ukraine was arbitrarily detained

In today's Chamber judgment in the case of [Tymoshenko v. Ukraine](#) (application no. 49872/11), which is not final¹, the European Court of Human Rights held, *unanimously*, that there had been:

a violation of Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights;

a violation of Article 5 § 4 (right to a speedy review of the lawfulness of detention);

a violation of Article 5 § 5 (right to compensation for unlawful detention);

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

and it held, *by a majority*, that there had been **no violation of Article 3 (prohibition of inhuman or degrading treatment or punishment)** in respect of Ms Tymoshenko's alleged ill-treatment during her transfer to hospital on 20 April 2012 and the effectiveness of the investigation of those complaints.

The case concerned complaints related to the detention of the former Ukrainian Prime Minister Yuliya Tymoshenko.

The Court held in particular: that Ms Tymoshenko's pre-trial detention had been arbitrary; that the lawfulness of her detention had not been properly reviewed; and, that she had no possibility to seek compensation for her unlawful deprivation of liberty.

The Court also found that, given that the judge had referred to her alleged hindering of the proceedings and contemptuous behaviour, her right to liberty had been restricted for other reasons than those permissible under Article 5.

Principal facts

Yuliya Tymoshenko, born in 1960, is the leader of *Batkivshchyna*, one of the strongest opposition parties in Ukraine, and of Yuliya Tymoshenko's Bloc. She was the Prime Minister of Ukraine in 2005 and between December 2007 and March 2010. In April 2011, criminal proceedings were brought against her for allegedly making an illegal order for the signing of a contract concerning gas imports. On 11 October 2011, she was convicted as charged, including of exceeding authority or official powers, and sentenced to seven years' imprisonment and a three-year ban on holding public office. On 29 August 2012, the conviction and sentence were upheld in a final judgment.

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

During the criminal proceedings, on 5 August 2011, the trial court ordered Ms Tymoshenko's detention on remand. The judge, granting the prosecutor's request for the detention order, held in particular that she had ignored the presiding judge's orders, had shown contempt towards the participants in the hearing and had refused to give any information about her address. On the same day, she was placed in the pre-trial detention facility in Kyiv (SIZO no. 13), where she remained until 30 December 2011. The trial court dismissed all her requests for release with reference to its reasoning given in the ruling of 5 August 2011. On 30 December 2011, Ms Tymoshenko was transferred to the Kachanivska Correctional Colony in Kharkiv to serve her prison sentence.

Suffering from numerous health problems – in particular severe food allergies, chronic gastritis, sciatica and other severe back problems, and vascular problems with sudden subcutaneous haemorrhages - Ms Tymoshenko alleges that the detention conditions in both facilities were inadequate and that she did not receive appropriate medical treatment. She maintains in particular that in the pre-trial detention facility the cells were poorly ventilated, the possibilities for her to take outside walks were limited, there was an insufficient supply of drinking water, the quality of the food was poor, and that in one of the cells there was no heating. In the colony, she was unable to take outdoor walks. According to Ms Tymoshenko, the authorities underestimated the seriousness of her health problems and failed to provide her with prompt and adequate medical care. On several occasions she refused to be examined by doctors other than those of her own choice, stating that she did not trust the medical staff of the detention facilities. Between February and April 2012, she was examined on a number of occasions by a team of German doctors, who recommended her treatment in a specialised hospital.

Following an interim measure indicated by the European Court of Human Rights that her medical treatment in an appropriate institutionalised setting should be ensured (see below), Ms Tymoshenko was transferred to the Kharkiv hospital on 20 April 2012. She maintains that she objected to the transfer and that force was used, allegedly causing bruising to her stomach and arms. She refused medical treatment because of what she contended was the inappropriateness of that hospital for her needs, and she went on a hunger strike in protest against the prison guard's violence and her forced transfer.

On 22 April 2012, Ms Tymoshenko was returned to prison and on the next day she filed a complaint with the Kharkiv Prosecutor Office about her forced transfer to the hospital. On 24 April 2012, she was examined by the colony medical officers. According to the examination report, she had a number of bruises, but their apparent age did not correspond with the time of the incident as indicated by her. According to the Government, a forensic medical expert was invited to examine Ms Tymoshenko, but she refused to allow such an examination. The prosecutor then decided not to open criminal proceedings for lack of evidence, but on 25 April 2012, following media reports about the incident, he quashed that decision and ordered further investigation. According to the Government, a number of potential witnesses were questioned - including colony staff and the ambulance driver who had taken her to the hospital - who stated that she had not complained of, and they had not seen any signs of, injuries on her. On the following day, Ms Tymoshenko was again asked to undergo a forensic medical examination, which she refused to do. A forensic expert evaluated her injuries on the basis of the examination report of 24 April 2012 and concluded that they could not have been inflicted on 20 April, as she alleged. Having familiarised himself with her previous medical records, he noted that recurrent haematomas could have resulted from a condition of her vascular system instead of having been caused by external blows. On 3 May 2012, the prosecutor once again decided not to open criminal proceedings.

On 9 May 2012, Ms Tymoshenko was again transferred to the Kharkiv hospital, where she started medical treatment under the supervision of a German neurologist and ended her hunger strike. She subsequently filed a criminal complaint concerning her permanent video surveillance in the hospital and the alleged publication of confidential medical

information. The prosecutor decided not to open a criminal case. An administrative action, brought by Ms Tymoshenko on 8 June 2012, concerning the same complaints and, in particular, the alleged denial of her right to make phone calls, was dismissed on 30 October 2012.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 10 August 2011.

Ms Tymoshenko complained in particular: that her detention conditions in the pre-trial detention facility in Kyiv and in the Kachanivska Correctional Colony in Kharkiv had been inadequate, with no appropriate medical care provided for her numerous health problems; that on 20 April 2012 she had been transferred to the hospital in Kharkiv against her will, that she had sustained injuries during the transfer and that the incident had not been properly investigated; that she had been under round-the-clock surveillance in the hospital; that her detention pending trial had been arbitrary and had lacked legal grounds; that she had been unable to challenge the lawfulness of the pre-trial detention and that she did not have an enforceable right to compensation; and, that her detention had ulterior motives. She relies principally on Article 3 (prohibition of degrading treatment or punishment), Article 5 (right to liberty and security), Article 8 (right to private life) and Article 18 (limitation on use of restrictions on rights) of the European Convention on Human Rights.

The Court decided, on 14 December 2011, to give priority to the case in view of the serious and sensitive nature of the allegations raised. On 15 March 2012, it granted an interim measure (under Rule 39 of its Rules of Court) requested by Ms Tymoshenko, indicating to the Ukrainian Government that her medical treatment in an appropriate institutionalised setting should be ensured. Following a formal request from the Government and their submission indicating that Ms Tymoshenko was receiving adequate treatment in an appropriate institutionalised setting, the Court decided to lift the interim measure on 31 May 2012, finding that the Government had complied with it. On the same date, the Court rejected a second request by Ms Tymoshenko for an interim measure, demanding that her treatment in a hospital in Germany should be ensured. On 28 August 2012, a public hearing took place in Strasbourg.

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

Dean **Spielmann** (Luxembourg), *President*,
Mark **Villiger** (Liechtenstein),
Karel **Jungwiert** (Czech Republic),
Ann **Power-Forde** (Ireland)
Ganna **Yudkivska** (Ukraine),
Angelika **Nußberger** (Germany),
André **Potocki** (France),

and also Stephen **Phillips**, *Deputy Section Registrar*.

Decision of the Court

As regards the scope of the case, the Court noted that after the case had been communicated to the Ukrainian Government, Ms Tymoshenko had raised several new complaints, relating to the criminal proceedings against her. The Court considered that those complaints were not an elaboration of her original complaints and that it was therefore not appropriate to add them to the case; they are the subject of an application currently pending before the Court (application no. 65656/12).

Complaints declared inadmissible

The Court declared inadmissible the complaints raised by Ms Tymoshenko under Article 3 concerning the conditions of her pre-trial detention and concerning the alleged lack of appropriate medical treatment during her detention. While the Court accepted that she might have experienced certain problems on account of the material conditions during part of the detention – in particular limited access to daylight, lack of hot water and lack of heating during limited periods – the situation had not been severe enough to be covered by the scope of Article 3. It was clear from the voluminous materials before the Court that Ms Tymoshenko's health had received considerable attention from the Ukrainian authorities, which had invested efforts far beyond the normal health-care arrangements available for ordinary detainees in Ukraine. The European Committee for the Prevention of Torture (CPT) had visited the pre-trial detention facility where she was detained in November and December 2011 and had not raised any particular concern with regard to the appropriateness of the medical care provided to her.

The Court also declared inadmissible - for non-exhaustion of national remedies – Ms Tymoshenko's complaints under Article 8 concerning her alleged round-the-clock surveillance in the hospital. While the Ukrainian courts had dismissed her administrative action, the first-instance judgment could be challenged on appeal, and it would have been open to Ms Tymoshenko to apply to the domestic courts for an interim measure.

Article 3

As regards Ms Tymoshenko's complaint regarding her alleged ill-treatment during her transfer to hospital on 20 April 2012, the Court noted that it was established that several bruises had appeared on her body during her detention in the colony. That alone called for an explanation by the State authorities as to their origin. According to the Government's submissions, the video surveillance in the colony had operated, at least on 20 April 2012, without any recordings of the images being made. The Court was therefore unable to verify the Government's assertion that the video surveillance had revealed nothing out of the ordinary.

The Court noted that the location of Ms Tymoshenko's bruises – on her stomach and arms – was consistent with her account that she had been violently pulled from her bed and punched in the stomach on the day of her transfer to the hospital. Nevertheless, the Court could not ignore the medical evidence before it that the apparent age of the bruises had not corresponded with the time she had indicated and that there had been other possible origins of the bruising which did not involve external trauma. Those findings could only have been satisfactorily confirmed or refuted if Ms Tymoshenko had undergone a full forensic medical examination, which she had refused to allow on two occasions. Given the absence of such forensic evidence, resulting from her decision not to undergo the examination, the Court could not find it established to the necessary standard of proof that the bruising had resulted from treatment in breach of Article 3 during her transfer to hospital on 20 April 2012.

Since Ms Tymoshenko had made an arguable complaint of ill-treatment before the Ukrainian authorities, they had been under an obligation to carry out an effective investigation into those allegations. However, the finding that the effectiveness of the investigation had been hindered by Ms Tymoshenko's refusals to undergo a forensic medical examination was sufficient to lead the Court to conclude that the investigation into her complaint had been "effective" for the purpose of the requirements of Article 3.

There had accordingly been no violation of Article 3 either on account of the alleged ill-treatment or on account of the alleged ineffectiveness of the investigation.

Article 5 § 1

As regards Ms Tymoshenko's complaint that her pre-trial detention had been unlawful and arbitrary, the Court noted that her detention pending trial had been ordered for an indefinite period of time, which in itself was contrary to the requirements of Article 5. The Court had found in other cases against Ukraine that this had been a recurrent issue resulting from legislative lacunae.

Furthermore, the detention order of 5 August 2011 had not indicated that Ms Tymoshenko had breached the obligation not to leave town, which had been applied to her as a preventive measure. Nor had the judge of the trial court asserted that she had been absent from any of the court hearings. Accordingly, no risk of absconding was discernible from the accusations which had been advanced among the reasons for her detention, which included namely the fact that she had refused to announce her address at a court hearing and that she had been a few minutes late for one of the hearings. The main justification for her detention indicated by the judge had been her alleged hindering of the proceedings and contemptuous behaviour. This reason was not included among those which would justify deprivation of liberty under Article 5 § 1. Moreover, it remained unclear how it was a more appropriate measure in the circumstances of Ms Tymoshenko's alleged contemptuous behaviour to replace the obligation not to leave town with her placement in detention. Given that the reasons indicated for her pre-trial detention remained the same until her conviction, the Court considered that the detention had been arbitrary and unlawful during the entire period. There had accordingly been a violation of Article 5 § 1.

Article 5 § 4

The lawfulness of Ms Tymoshenko's detention had been reviewed by the Ukrainian courts on several occasions. However, the relevant court decisions did not satisfy the requirements of Article 5 § 4, as they had been confined to the mere statement that no appeal was possible against a ruling on change of a preventive measure ordered during the examination of a criminal case and had reiterated the initially applied reasoning, which the Court had found to be deficient. While Ms Tymoshenko had advanced specific arguments in her numerous applications for release – in particular her unfailing compliance with the obligation not to leave town and the fact that she had made no attempt to obstruct the investigation – the trial court had dismissed her requests without having given any consideration to those arguments. Furthermore, the Court had already found in other cases that Ukrainian law did not provide for a procedure to review the lawfulness of continued detention after the completion of a pre-trial investigation that would satisfy the requirements of Article 5 § 4. There had accordingly been a violation of Article 5 § 4.

Article 5 § 5

The Court observed that under Ukrainian law the right to compensation arose when the unlawfulness had been established by a judicial decision. However, there was no procedure under Ukrainian law for seeking compensation for a deprivation of liberty found to be in breach of Article 5 by the European Court of Human Rights. The Court had already noted that lacuna in its case-law in other cases against Ukraine and the situation had not changed. There had accordingly been a violation of Article 5 § 5.

Article 18 in conjunction with Article 5

The Court noted that Ms Tymoshenko, who was the former Prime Minister and the leader of one of the strongest opposition party, had been accused of exceeding authority or official powers and had been prosecuted shortly after the change of Government. In that respect, the case was similar to the case of *Lutsenko v. Ukraine* (6492/11), which had concerned the detention of a former Minister. Ms Tymoshenko complained in particular

that her detention had been used by the authorities to prevent her from political life and from running as a candidate in the elections of 28 October 2012.

The Court had already found that Ms Tymoshenko's detention – although according to the Government it had been effected for the purposes provided under Article 5 – had mainly served to punish her for a lack of respect for the trial court. The Court therefore concluded that the restriction of her liberty had not been applied for the purpose of bringing her before a competent legal authority on reasonable suspicion of having committed an offence, but for other reasons. The Court considered this a sufficient basis for finding a violation of Article 18 in conjunction with Article 5.

Just satisfaction (Article 41)

Ms Tymoshenko did not submit any claims in respect of damage or costs and expenses.

Separate opinions

Judges Jungwiert, Nussberger and Potocki expressed a joint concurring opinion. Judges Spielmann, Villiger and Nussberger expressed a joint dissenting opinion. These opinions are annexed to the judgment.

The judgment is available only in English.

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Press contacts

echrpess@echr.coe.int | tel: +33 3 90 21 42 08

Nina Salomon (tel: + 33 3 90 21 49 79)

Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)

Denis Lambert (tel: + 33 3 90 21 41 09)

Jean Conte (tel: + 33 3 90 21 58 77)

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.