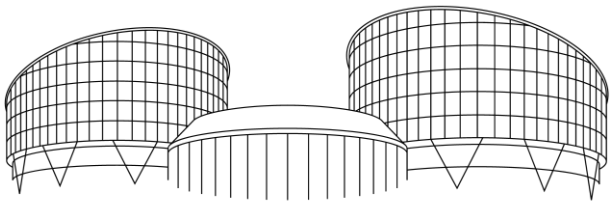

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FORMER FIFTH SECTION

CASE OF TYMOSHENKO v. UKRAINE

(Application no. 49872/11)

JUDGMENT

STRASBOURG

30 April 2013

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

In the case of Tymoshenko v. Ukraine,

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

Dean Spielmann, *President,*
Mark Villiger,
Karel Jungwiert,
Ann Power-Forde,
Ganna Yudkivska,
Angelika Nußberger,
André Potocki, *judges,*

and Stephen Phillips, *Deputy Section Registrar*,

Having deliberated in private on 28 August 2012 and 9 April 2013,

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

PROCEDURE

1. The case originated in an application (no. 49872/11) 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, Ms Yuliya Volodymyrivna Tymoshenko ("the applicant"), on 10 August 2011.

2. The applicant was represented by Ms Valentyna Telychenko and Mr Sergiy Vlasenko, lawyers practising in Kyiv. The Ukrainian Government ("the Government") were represented by their Agent, Mr Nazar Kulchytskyy, from the Ministry of Justice.

3. The applicant alleged, in particular, that her detention had been politically motivated; that there had been no judicial review of the lawfulness of her detention in Kyiv SIZO no. 13; that the conditions of her detention had been inhuman, with no medical care provided for her numerous health problems; and that she had been held under round-the-clock surveillance in Kharkiv Hospital.

4. The Court granted priority to the application (Rule 41 of the Rules of Court). On 14 December 2011 the application was communicated to the Government.

5. A hearing took place in public in the Human Rights Building, Strasbourg, on 28 August 2012 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr	N. KULCHYTSKYY,	Agent,
Mr	M. BEM,	Counsel,
Mr	V. BOGUSH,	
Ms	R. MOISEIENKO,	
Mr	O. MYKYTENKO,	
Mr	A. BAIRACHNYI,	
Mr	S. MOTLIAKH,	Advisers;

(b) *for the applicant*

Ms	V. TELYCHENKO,	
Mr	S. VLASENKO,	Counsel,
Ms	H. SENYK,	Adviser.

The Court heard addresses by Mr N. Kulchytskyy, Ms V. Telychenko and Mr S. Vlasenko, as well as their answers to questions put to the parties.

6. Judge Boštjan Zupančič was exempted from sitting in the case (Rule 28 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant, born in 1960, is serving a prison sentence in Kachanivska Penal Colony no. 54 in Kharkiv. She is currently hospitalised in the Central Clinical Hospital of the State Railway in Kharkiv.

A. Background of the case

8. The applicant is the leader of the Batkivshchyna political party and of Yulia Tymoshenko's Bloc.

9. During the periods from 24 January to 8 September 2005 and from 18 December 2007 to 3 March 2010, she exercised the function of Prime Minister of Ukraine. Before becoming Prime Minister, the applicant was one of the leaders of the Orange Revolution, during which she had openly criticised the then rival presidential candidate Victor Yanukovych.

10. In the parliamentary elections held in 2006 Yulia Tymoshenko's Bloc was victorious in fourteen regions in the country (out of twenty-six) and polled 22.27% nation-wide.

11. In the 2007 parliamentary elections Yulia Tymoshenko's Bloc polled 30.71% throughout Ukraine and received 156 seats (out of 450) in Parliament.

12. The applicant was the main opponent of President Victor Yanukovych in the presidential election held in 2010. In the second round of the election she won the support of 45.47% voters, while Mr Yanukovych won 48.95%.

13. At the time of the introduction of the application, the applicant was the most visible opposition politician and the head of one of the strongest opposition parties in Ukraine.

B. Criminal proceedings brought against the applicant

1. Regarding the gas agreement

14. On 11 April 2011 the General Prosecutor's Office (hereinafter "the GPO") instituted criminal proceedings against the applicant on suspicion of abuse of power under Article 365 § 3 of the Criminal Code. The applicant was suspected of exceeding her authority and abusing her office in ordering the head of the State-owned enterprise Naftogaz of Ukraine to sign an agreement with the Russian enterprise Gazprom providing for the importation of natural gas at a price of 450 United States dollars (USD) per 1,000 cubic metres, which had caused the State to suffer considerable financial losses.

15. On 25 May 2011 the pre-trial investigation was officially completed and the applicant was given fifteen working days to read the case file. At the same time, she was called almost daily to attend the GPO's premises for questioning concerning the other criminal cases which had been initiated against her in the meantime. The case file at that time comprised some 4,000 pages in fifteen volumes.

16. On 17 June 2011 the case was referred to the Kyiv Pecherskyy District Court (hereinafter "the Pecherskyy Court") for trial.

17. In a judgment of 11 October 2011 the court found the applicant guilty as charged. It sentenced her to seven years' imprisonment and imposed a three-year prohibition on exercising public functions on her.

18. On 23 December 2011 the Kyiv Court of Appeal upheld the first-instance judgment.

19. On 29 August 2012 the Higher Specialised Court delivered a final judgment in the case confirming the applicant's guilt and sentence.

2. Other criminal cases against the applicant and related events

20. Earlier, in 2010, two other criminal cases – one concerning the misuse of funds allocated for the purchase of ambulances and the other concerning funds received by Ukraine within the framework of the Kyoto

Protocol – had been opened against the applicant under Articles 364 and 365 of the Criminal Code.

21. In July 2011 the Ukrainian Security Service re-opened another criminal case against the applicant, on suspicion of financial fraud during her tenure as head of the company United Energy Systems of Ukraine in the 1990s, which had been closed in 2001.

22. On 7 December 2011 the investigator asked the Kyiv Shevchenkivskyy District Court ("the Shevchenkivskyy Court") to order the applicant's remand in custody in order to facilitate the further pre-trial investigation of this case.

23. On 8 December 2011 the court granted that motion following two hearings conducted in the SIZO medical unit, during which the applicant was lying in bed because of pain. The hearings were interrupted three times for her emergency treatment with painkillers.

24. On 21 December 2011 the Kyiv Court of Appeal upheld the above ruling.

25. On 29 March 2012 the applicant was officially indicted.

C. The applicant's pre-trial detention in the course of the criminal proceedings regarding the gas agreement

26. During the initial stages of the pre-trial investigation and the trial concerning the gas agreement the applicant was at liberty, subject to an undertaking not to abscond.

27. Between 29 June and 4 August 2011 the Pecherskyy Court held sixteen hearings, in all of which the applicant participated.

28. On 5 August 2011 the hearing started at 9.00 a.m. The applicant was late and her counsel asked for a half-hour break. The applicant arrived seven minutes later. The court resumed the hearing at 9.30 a.m. The applicant explained that she was late due to her exhaustion. The previous hearing had ended at 8:02 p.m. the day before and she had had to prepare for the next hearing late at night.

29. During the hearing the judge heard the incumbent Prime Minister, Mr Azarov. The applicant's questions were almost all dismissed by the judge, but allegedly made the witness overly nervous and upset. It is not clear whether the applicant asked the questions herself or through her lawyers.

30. After the cross-examination of this witness, a representative of the GPO asked the judge to order the applicant's remand in custody on the grounds that she had obstructed justice and had demonstrated her disrespect for Judge K. and those taking part in the hearing.

31. Judge K. granted the GPO's motion on the same day and ordered the applicant's detention for an undetermined period, with reference to

Article 148 of the Code of Criminal Procedure. His reasoning was as follows:

> "Both during the pre-trial investigation stage and the trial the defendant has systematically been violating court procedures, has been ignoring the presiding judge's orders, has been showing contempt towards the participants in the hearing and the court, has been knowingly protracting the judicial examination of this case, and has been performing acts aimed at impeding establishing the truth in the case, in particular, by hindering the questioning of witnesses."

32. He added that the applicant had refused to give any information about her domicile (referring to the case file). The letters sent to the address indicated by her had been returned by the post office. The applicant had also repeatedly refused to sign notices informing her of scheduled hearings. As noted in the ruling, it was final, no appeal lying against it.

33. The applicant was detained in the court room and was transferred to Pre-Trial Detention Facility no. 13 in Kyiv ("SIZO no. 13").

34. In the course of subsequent court hearings held on 8, 10, 11, 15, 16, 18, 22, 25, 26, 29 and 31 August and on 1, 2, 5, 6, 7 and 21 September 2011 the applicant and her defence counsel repeatedly lodged requests to have her detention replaced with another preventive measure. They submitted that the applicant had complied with the obligation not to leave town, had participated in all the investigative measures as required and had attended all the court hearings. The applicant further contended that there was no legal basis for remanding her in custody as punishment for her supposed lack of respect towards the presiding judge. She also complained that her detention was contrary to the safeguards of Article 5 of the Convention and should be replaced by a less intrusive preventive measure. Numerous letters of personal guarantee from prominent public figures including clergy, artists, writers, journalists and scientists were addressed to Judge K. with a request to release the applicant under their personal commitment to ensure her attendance at court. A proposal of bail in the amount of one million Ukrainian hryvnias was also made.

35. The Pecherskyy Court dismissed all the requests for the applicant's release with reference to its reasoning given in the ruling of 5 August 2011. Each subsequent dismissal was based on the earlier dismissals. The court stated, *inter alia*, that the applicant had continued to show disrespect for the court and the trial participants, and had not followed the instructions of, and had not responded to remarks made by, the presiding judge.

36. On 12 August 2011 the Kyiv City Court of Appeal examined the applicant's appeal against the detention order, in which the applicant had claimed that her detention was unlawful and unlimited in duration. The appellate court dismissed it without examination of the merits with the following reasoning:

> "... Pursuant to Article 274 of the Code of Criminal Procedure ("the CPC"), a court may change a preventive measure during its examination of the case. When choosing

remand in custody as a preventive measure, the court shall be guided by the relevant provisions of Chapter 13 of the CPC.

Article 274 of the CPC does not provide, in substance, for the right to challenge a court's decision about a change of preventive measure during the examination of a criminal case.

During the examination of the present criminal case, allowing the prosecutor's motion on 5 August 2011 the Kyiv Pecherskyy District Court changed the preventive measure in respect of the defendant Yu. Tymoshenko from an undertaking not to abscond to remand in custody. This decision has been challenged on appeal.

However, according to the CPC, rulings on selection, change or discontinuation of a preventive measure delivered during the judicial examination of a case are not amenable to ordinary appeal. It follows that there are no grounds for accepting [the applicant's] appeal against the decision of 5 August 2011 for examination."

37. In its verdict of 11 October 2011 convicting the applicant (see paragraph 17 above), the Pecherskyy Court decided to keep her in detention as a preventive measure until her conviction became final.

38. On 29 November, 1 and 20 December 2011 the applicant lodged further requests for release referring, in addition to her earlier arguments, to the deterioration of her health.

D. Conditions of the applicant's detention in SIZO no. 13 in Kyiv

39. The applicant was detained in SIZO no. 13 from 5 August to 30 December 2011.

1. Material conditions of detention

40. The applicant was placed in cell no. 242 together with two other detainees. In her original application, she indicated that the size of the cell was about fourteen square metres, while in her observations on the admissibility and merits she stated that its size was sixteen square metres. According to the Government, the cell measured 16.4 square metres.

41. The applicant also maintained that the cell had a single window which could not be opened, being too high to be reached by the inmates, and was unventilated which, taking into account the fact that her two cellmates had smoked, had caused serious problems for her health. According to the Government, the applicant had been able to open the window, which had measured 1.5 by 1.5 metres, and one of her cellmates had not been a smoker while the other had only smoked outside the cell during her outdoor walks. Moreover, the cell had been equipped with a ventilation system.

42. According to the applicant, the cell had lacked hot water and had often not had a supply of cold water, and she had not been provided with any drinking water. The Government indicated that the cell had been equipped with a supply of hot and cold water, a separate toilet and a washing stand with a tap and had been equipped with central heating. They

added that during her time in the SIZO, the applicant had received 316 litres of drinking water in 82 containers.

43. According to the applicant, the cell had not been sufficiently lit, had been damp and had had a pungent smell and mould growing in it. The light in the cell could not be switched off and had been kept permanently on. The Government specified that two lamps each consisting of two 40-watt bulbs (a total of four 40-watt bulbs) had been used for lighting during the day and one lamp with a 60-watt bulb for lighting during the night.

44. The applicant stated that at the time of introducing her application to the Court, on 11 August 2011, she had been entitled to take a shower once per week and, according to her, the bedding in her cell was not regularly changed. In her observations on the admissibility and merits, she indicated that she had been allowed to shower twice per week. The Government observed that while, according to the general rule, each detainee was provided with access to bathing facilities for thirty minutes once every seven days, the applicant had been permitted to have a shower several times a week. They further pointed out that all detainees were provided with bed linen. They noted that as of 5 August 2011, the remaining stock of new bedding in the SIZO included 444 blankets, 545 pillows, 8,216 sheets, 6,179 towels and 4,473 pillowcases. The applicant, having received a total of 278 items of bed linen from her relatives, had never asked the SIZO administration to have her bed linen changed.

45. The applicant noted that the Government had not mentioned the number of inmates who had been present at the relevant time in respect of the quantity of bed linen, and what bed linen had been available to her. She maintained that she had had to rely exclusively on her relatives in order to be provided with drinking water, bed linen, food and other essentials.

46. On 25 November 2011 the applicant was temporarily moved to cell no. 300, where she stayed until 29 November 2011 when she was transferred to a newly refurbished cell, no. 260, in the medical unit. According to her, there had been no heating or hot water supply in cell no. 300.

47. Between 29 November and 6 December 2011 an *ad hoc* CPT mission visited Kyiv SIZO no. 13. On 30 November 2011 they paid a visit to the applicant. According to her, that visit was the reason for her transfer to cell no. 260 and the improvement of the conditions of her detention.

2. The applicant's daily regime and the food provided to her

48. On the days of court hearings, which were, according to the applicant, conducted almost daily, she was woken up at 5 a.m. in order to be transported to the court by 7 a.m. As further submitted by her, she had had to spend, before and after the hearings, two or more hours in a room measuring about 1.2 x 1.4 metres without a window. The Government denied this. After the hearings, the applicant had returned to her cell no

earlier than 9 pm. On these days she had not been given time for exercising or an outdoor walk.

49. In her original application, the applicant stated that she had not been able to eat any food provided by the SIZO due to her chronic gastroenterological diseases and allergies. After she had eaten a few meals there, her chronic gastroenterological diseases had worsened and she had experienced constant pain in her stomach. The applicant also argued that her daily court hearings had left her no time to seek medical assistance while in the SIZO. In addition, she had not been allowed to take her food with her to the court. As a result, she had spent up to sixteen hours without any food on days when she had been required to attend court hearings.

50. In her observations on the admissibility and merits of the application, the applicant stated that she had not had an assigned room or time to consume food in the court building and had found it humiliating to do so in front of the public including journalists, reporters and photographers. According to her, she had been held in the courtroom for the entire hearing and had only been able to leave it to use the toilet facilities. As a result, she had remained without any food or drink for entire court hearings, which had lasted for up to fourteen hours.

51. According to the Government, before the start of the court hearings, the applicant had been held in the courtroom where her case was to be examined. The Government also noted that, contrary to the applicant's claims, she had been given time for outdoor walks and physical exercise on the days of court hearings. In fact, when she had been escorted back to the SIZO after court hearings before 2 p.m., she had been able to go for an outdoor walk in accordance with the routine daily schedule. In other instances, the applicant had usually refused to have an outdoor walk.

52. The Government further stated that the applicant had brought various foodstuffs and personal items of clothing back to the SIZO with her after each court hearing on 31 August, 1, 2, 5, 7 and 8 September 2011, which indicated that she had been able to receive and consume food on the days of court hearings. Consequently, the SIZO administration had not prepared a packed lunch to be taken by the applicant upon being escorted to the courtroom.

53. The Government also observed that the applicant had received substantial food parcels after her arrival in the SIZO. From 5 to 11 August 2011, she had been provided with food in compliance with legal requirements. Subsequently, from 11 August 2011 onwards, the applicant had officially refused to consume food prepared in the SIZO and had indicated that she would only accept food delivered from her home. The Government noted that during the period from 5 August to 22 December 2011, the applicant had received 82 parcels including, in total, 60 eggs; 605 dietary food items; 224 food items with a high fat content; 202 vegetables and pieces of fruit; and 316 litres of drinking water.

54. The Government noted that the applicant had refused to consume food prepared in the SIZO which had, therefore, been unable to provide her with a special diet. Moreover, despite her contention that her doctors' recommendations did not allow her to eat, in particular, eggs and food items with a high fat content, the food delivered to her in the parcels suggested that the applicant had actually consumed a great number of prohibited food items.

3. The applicant's state of health and the medical treatment provided to her

55. The applicant stated that due to her chronic illnesses, her personal physician had insisted on a strict diet, excluding any traces of eggs, meat or fatty foods. In order to prevent allergies the applicant's physician had also advised her to limit her exposure to toxic compounds, including tobacco smoke, disinfectants and plastic utensils. She complained of sudden subcutaneous haemorrhages, acute pain in her stomach and throat, the exacerbation of chronic illnesses, including chronic gastritis, chronic pancreatitis, intestinal dysbiosis, adenomyosis of the uterus, grade 2 nodular goitre, insomnia, relapsing urticaria caused by a variety of allergic reactions, and severe drug and food (egg) allergies.

56. On 10 August 2011 the applicant requested the Court under Rule 39 of the Rules of Court to indicate to the Government the necessity of her release given the alleged risk to her life inherent in her detention.

57. On 16 August 2011 the Court rejected this request.

58. On 19, 25 and 29 August and on 1 and 2 September 2011 Judge K. and the SIZO authorities rejected the applicant's requests for a medical examination by doctors whom she trusted. Instead, the applicant was offered a medical examination by doctors assigned by the Ministry of Public Health. She refused the offer.

59. According to the Government, the applicant was examined by doctors from the SIZO medical unit upon her arrival there on 5 August 2011 but refused to undergo a detailed medical examination. On 6 August 2011 she refused to be seen by a generalist, a psychiatrist, and a dentist, to have her blood pressure measured, to undergo an electrocardiogram, a fluorography examination, and blood and urine tests. She maintained her refusal on 12 August 2011.

60. On 16 August 2011, having returned from a court hearing to the SIZO, the applicant complained of a build up of fluid in the cavity of her left elbow. She was diagnosed with a haematoma under the skin of the cavity of the left elbow with an undetermined cause. She insisted on undergoing tests in an independent laboratory.

61. On the following day the applicant was examined by the head of the SIZO medical unit, who established that her state of health had not changed. The applicant refused to undergo a blood test in the SIZO and insisted that

the test be carried out in an independent laboratory in the presence of her personal doctor.

62. On 18 August 2011 the applicant complained of newly discovered haematomas on her body but refused to undergo the suggested medical examination. She was advised to undergo laboratory tests but she refused to do so without the presence of her personal doctor, Dr P., and a nurse. She also refused to be seen by an expert panel of doctors appointed by the Ministry of Public Health ("the medical panel"). In the evening on the same day she complained of asthenia, vertigo, dehydration and vomiting.

63. On 19 August 2011 the applicant complained of general asthenia, fatigue, vertigo, areas of swelling caused by a build up of fluid on the lower limbs, a nosebleed and frequent dehydration. According to her, there were no newly discovered haematomas. However, she refused to be seen by the medical panel, insisting on undergoing an examination and laboratory tests in the presence of Dr P. and the nurse.

64. On 20 August 2011 the applicant was examined by the head of the SIZO medical unit, who found that her state of health was satisfactory and that there were no newly discovered haematomas. The applicant refused to undergo a detailed medical examination.

65. She was also seen by the head of the SIZO medical unit on the following day. The doctor confirmed that her state of health was satisfactory. The applicant complained of dehydration and a bleeding nose at night; according to her, there were no newly discovered haematomas but she refused to undergo a detailed medical examination.

66. On 22 August 2011 the applicant agreed to be examined by the medical panel. She complained of the appearance of a petechial skin rash and haematomas and stated that she had twice had a bleeding nose at night without having high blood pressure. The panel agreed that the applicant's general state of health was satisfactory. The applicant was advised to undergo laboratory tests.

67. On 23 August 2011 she was seen again by the medical panel. Dr P. and her nurse were allowed to join the panel. The applicant refused to undergo a medical examination and confidential laboratory tests but agreed to have her blood clotting time assessed by the Turner method on condition that any biological material be destroyed by incineration. The results showed that her body's ability to coagulate blood was normal. The applicant was told to eat food full of protein and vitamin C. In the evening she complained of headache and asthenia. She was examined but her blood flow was normal. She was given two tablets of ketanov (ketorolac, an anti-inflammatory drug) and her treatment with collagen and ascorutin (vitamin C and flavonoids) was prescribed.

68. On 24 August 2011 the applicant was examined by the head of the SIZO medical unit. She complained of asthenia, vertigo, dehydration and new haematomas, but refused to undergo a detailed examination. In the

course of examinations carried out on 25 and 26 August 2011 no serious change in her state of health was established.

69. On 27 August 2011 the applicant was offered an examination by the medical panel in the presence of Dr P. and the nurse. She refused to undergo the examination or laboratory tests in two laboratories outside the SIZO and insisted on a confidential examination by doctors of her choice and on a laboratory examination without the medical panel being informed of the results.

70. On 30 August 2011 the applicant was again advised to undergo an examination by the medical panel in the presence of Dr P. and the nurse. She drew attention to the appearance of a rash on the lower third of her chest, but refused to undergo a further medical examination or laboratory tests.

71. On 31 August and on 1 and 2 September 2011 she was examined by the head of the SIZO medical unit, who found no serious changes in her state of health.

72. On 3 September 2011 the applicant was advised to undergo examination by the medical panel in the presence of Dr P. and the nurse. The applicant refused to do so.

73. On 6 September 2011 she maintained her refusal.

74. On 4, 5, 6 and 7 September 2011 she was examined by the head of the SIZO medical unit. Her state of health was found to be satisfactory. The applicant complained of asthenia, headache, dehydration, abdominal pain on an empty stomach and broken sleep but she refused to undergo a detailed examination and insisted on being seen by Dr P. She was told to take pariet (rabeprazole, a drug which slows or stops the production of stomach acid) tablets.

75. The head of the SIZO medical unit visited the applicant again on 8 September 2011. He found no serious changes and added a multivitamin tablet to the applicant's treatment regimen. On 9, 10 and 11 September 2011 the applicant was advised to continue the indicated treatment.

76. On 12, 13, 14 and 15 September 2011 she continued to be seen by the head of the SIZO medical unit. She complained of pain while swallowing, asthenia, headache, vertigo, intestinal pain and broken sleep. No new haematomas were discovered and the applicant refused to undergo a further detailed examination. She was told to use a nasal spray, gargle with a solution, drink hot drinks and take paracetamol.

77. On 15 September 2011 the applicant was advised to undergo an examination by the medical panel in the presence of Dr P. and the nurse. She refused to do so.

78. On 17 September 2011 the applicant was consulted by a medical panel composed of experts from the SIZO, the State Prisons Service and the O.O. Bogomolets National Medical University. She complained, *inter alia*, of coughing, general asthenia and periodic vertigo. She noted the

improvement of her state of health after gargling and drinking tea with honey and taking vitamins. She was advised to continue gargling and to consume healthy food and drinks. However, she refused to undergo a more detailed medical examination.

79. On 21 September 2011 the applicant was seen by the medical panel in the presence of Dr P. She complained of general asthenia, periodic vertigo, and right subcostal pain and irritation. The panel confirmed an improvement in her state of health. The applicant refused to undergo a further medical examination. She was advised not to eat fresh vegetables and fruits, but rather to eat them cooked and to exclude dairy products and spicy, salty and sour dishes from her diet. She was also prescribed, *inter alia*, motilium (domperidone, used to suppress nausea and vomiting) and told to eat no less than four times per day.

80. From 16 September to 3 October 2011 the applicant was examined on a daily basis by specialists from the SIZO medical unit, who established that her state of health had gradually improved and that her catarrhal symptoms had disappeared.

81. On 3 and 4 October 2011 she was examined by the head of the SIZO medical unit, who confirmed that her state of health was satisfactory. The applicant complained of asthenia, headache, vertigo, the periodic appearance of haematomas, dehydration and broken sleep. She refused to undergo a detailed examination. She was prescribed detralex (diosmin, a flavonoid used to treat venous insufficiency), motilium, ascorutin and multivitamins.

82. Between 5 and 11 October 2011 the applicant was examined by the head of the SIZO medical unit on a daily basis. She complained of pain in the lumbar region of the spine that, according to her, had first occurred when walking after she had jumped from a horizontal bar. She was diagnosed with lumbago and prescribed a medicine (pariet) and an intramuscular injection of movalis (a non-steroidal anti-inflammatory drug) was administered. She was also given one tablet of movalis to take after eating.

83. On 12 October 2011 the applicant was prescribed additional treatments of movalis, pariet, donormyl (a sleeping tablet), tetramycin (an antibiotic) and multivitamins.

84. On 13 October 2011 she again complained of pain in lumbar region of the spine. She was prescribed treatment with xefocam (lornoxicam, a painkiller), pariet and multivitamins.

85. On the following day the applicant was examined by the medical panel. She complained of pain in the lumbar region of her spine, but refused to be examined in detail. Manual therapy was carried out.

86. From 14 October to 5 November 2011 the applicant continued to be examined by the head of the SIZO medical unit on a daily basis. The

medical treatment continued in accordance with the previous recommendations, with some additional treatment being provided.

87. On 18 October 2011 she was examined by the medical panel. She complained of pain in the lumbar region of her spine. From 18 to 28 October 2011 she was provided with massage and medicinal treatment.

88. In the meantime, on 20 October 2011, the applicant had been examined again by the medical panel. She confirmed that the pain in the lumbar region of the spine had decreased. The doctors noted an improvement in her general state of health and advised her to continue the prescribed treatment (xefokam and dolobene, a gel containing ibuprofen). The applicant, however, refused to take the prescribed medicines.

89. The medical panel also examined the applicant on the next day. She stated that the pain in the lumbar region of the spine had decreased. The doctors confirmed an improvement in her state of health and advised her to continue the prescribed treatment (xefokam, dolobene).

90. On 24 October 2011 the applicant was examined by the medical panel. She complained of pain in the lumbar region of the spine. She was given an intramuscular injection of xefokam and dolobene.

91. On a daily basis from 25 to 28 October 2011 the applicant continued to be under the supervision of the medical panel, which found that her state of health had improved. She continued to refuse to undergo further detailed examination.

92. On 5 November 2011 she refused to undergo an x-ray examination.

93. On 7 November 2011 the applicant was examined by the medical panel, which recommended an additional examination and continuance of the prescribed treatment.

94. She was examined again by the medical panel two days later. In addition, she underwent ultrasonic duplex scanning of her lower limbs. She had been previously diagnosed with lumbar osteochondrosis, sciatica on the right side, tonic muscle spasms, serious disturbances of the functions of the spine and right lower limbs and, possibly, spondyloarthrosis and spondyloarthralgia. The panel concluded that the verification of the diagnosis and a determination of the treatment strategy were necessary and an additional examination and additional consultations between experts were therefore needed. However, the applicant refused to undergo the suggested x-ray examination.

95. On 12 November 2011 the applicant was given another prescription of ascorutin and tetramycin.

96. On 14 November 2011 she was examined by the medical panel, but refused to undergo a detailed examination and a blood test.

97. On 16 November 2011 the applicant refused to take tetramycin, which had been prescribed on the same day.

98. On 19 November 2011 the applicant was examined by the medical panel in the presence of Dr P. and her nurse. In order to adjust the treatment

previously prescribed, the applicant was advised to undergo a blood test but she refused to do so. The applicant also refused to undergo a detailed examination and receive injections of betamethasone (a steroid with anti-inflammatory and immunosuppressive properties). The medical panel recommended continuing the previous treatment.

99. On 23 November 2011 the applicant underwent an examination (including an MRI scan) of the abdomen. She was advised to provide blood, urine and stool samples for laboratory examination but she refused to do so. The medical panel established no signs of any medical condition affecting her pancreas but detected chronic cholecystitis which had developed after an acute cholecystitis episode, and prescribed chofitol (an indigestion remedy). The applicant was told to continue taking ascorbic acid and rutin, to exclude fatty, fried and spicy foods from her diet and to increase the dosage of the pills she was taking that were intended to remove toxic compounds from her system. The panel noted that the applicant had not fully complied with the previous recommendations.

100. In the course of an examination of 26 November 2011 the applicant complained that after receiving vitamin B injections (milgamma), she had had an allergic reaction. After taking one tablet of telfast (fexofenadine, an antihistamine), the allergic reaction had stopped. According to her, there were no new haematomas on her body. She was prescribed furosemide (a diuretic).

101. From 6 to 29 November 2011 the applicant was seen daily by the doctors of the SIZO medical unit. She complained of headache, dehydration, discomfort in the epigastric and right subcostal regions and broken sleep, but refused to undergo a thorough examination and stated that she would follow the prescribed treatment at her discretion. During this period, she noted that the pain in the lumbar region of the spine had decreased.

102. On 29 November 2011, at her request, she was transferred to the SIZO medical unit. After an initial examination, she was prescribed treatment with diclofenac (an anti-inflammatory drug), furosemide, sirdalud (a muscle relaxant), diprospan (a corticosteroid), milgamma, pariet, chofitol, ascorbic acid, rutin, and Viprosal B (a pain-relieving ointment). She was also advised to undergo a general and biochemical blood test, coagulogram analysis, to provide urine and stool samples for testing, and was also prescribed a special diet.

103. On 30 November 2011 the applicant was examined by the head of the SIZO medical unit, who diagnosed widespread lumbar osteochondrosis in the form of sciatica on the right side with temporary severe pain but without signs of compressive radiculopathy, and a hemangioma.

104. On 2 December 2011 she was examined by the medical panel in the presence of Dr P. and her nurse. She was advised to undergo a blood test but she refused to do so, continuing to insist on a confidential blood

examination outside Ukraine with the involvement of her personal doctor and without the involvement of State representatives.

105. The applicant stated that on 7 December 2011 her lawyer had been in the SIZO medical unit in order to prepare for the appeal hearing. The applicant and her lawyer had not been able to have their meeting in private because she had been unable to move, walk on her own or be seated.

106. On 8 December 2011 the applicant refused to undergo a medical examination by the medical panel which, having examined the available medical documentation, noted that among other illnesses the applicant was suffering from chronic cholecystitis which had developed after an acute cholecystitis episode and that she had not fully complied with the previous medical recommendations.

107. On 12 December 2011 the applicant was again examined by the medical panel. The applicant was advised, *inter alia*, to continue using *Discus Compositum* and *Traumeel S*. (homeopathic ointments designed to reduce joint pain and inflammation), to undergo general and biochemical blood tests, coagulogram analysis and to provide a urine sample for testing. The applicant was repeatedly offered the opportunity to undergo a laboratory blood test, but she refused to do so. The panel again noted that the applicant had not fully complied with the previous recommendations. It was also noted that there was no need for surgery.

108. On 13 and 14 December 2011 the applicant was advised to submit to an examination by a specialist from the Ministry of Public Health and the State Prisons Service, but she refused to do so.

109. On 16 December 2011 the applicant was examined by medical specialists from the State Prisons Service. Based on the results of the report of 12 December 2011 and the information obtained during the medical examination on 16 December 2011, the panel found that there were no medical reasons that would render the applicant's attendance at the court hearings inappropriate.

110. On 21 December 2011 the applicant underwent an electrocardiogram and an echocardiogram. No heart condition was discovered.

E. Conditions of the applicant's detention in Kachanivska Colony

1. Material conditions

111. On 30 December 2011 the applicant was moved to Kachanivska Colony in Kharkiv to serve her prison sentence. She was held in a cell measuring 37.1 square metres, sharing it with another inmate. The cell was equipped with two PVC windows each measuring 3.5 square metres, providing natural light and aeration of the cell. Artificial lighting was

provided by energy-efficient bright tube lamps. The cell was also ventilated mechanically.

112. The cell had a separate shower room measuring 3.5 square metres and a WC of 4.1 square metres. The shower room was equipped, among other things, with a water heater and a washing machine. The applicant therefore had round-the-clock access to hot and cold water and could take a shower at any time. The inventory of the cell included two single wooden beds with orthopaedic mattresses, four sets of bed linen, a sliding-door wardrobe, a kitchen table, a coffee table, two chairs, a coat rack, a bedside table for shoes, and a suite of kitchen furniture with a dishwasher and cabinets. There were also a TV set, an ironing board, a hairdryer, a refrigerator, a microwave oven, an electric kettle and all necessary kitchen utensils.

113. Food was provided in accordance with national regulations. The food was prepared in the dining room of the colony and delivered to inmates in special containers. In addition, the applicant had the right to receive an unrestricted number of parcels containing foodstuffs. By 5 April 2012, the applicant had received thirty such parcels.

114. According to the Government, from the date of her arrival at the colony, the applicant had refused to take daily walks on account of her state of health. As a rule, she had been entitled to daily walks at any time during the day. The exercise yard measured 52 square metres.

115. The applicant stated that due to her state of health, she had requested a crutch and, on 17 January 2012, a walker to assist her in moving on her own, but the administration of the colony had refused to provide her with any walking aids. As a result, the applicant had been unable to walk on her own in her cell, let alone be able to enjoy daily outdoor walks. The colony had not taken any measures such as providing her with a walker or a wheelchair to assist her moving around or to allow her to enjoy being outdoors.

2. Medical treatment provided to the applicant

116. According to the Government, on 7 January 2012 the applicant was examined in the regional clinical hospital. She underwent a helical computed tomography scan of her brain, an MRI scan of her jugular spine, lumbosacral spine and neck, and a blood test. On the same date she was examined by medical specialists from Kharkiv National Medical University and the State Prisons Service. Upon those examinations, the previous diagnoses were confirmed as follows: widespread lumbar osteochondrosis in the form of sciatica on the right side, with temporary severe pain but without signs of compression radiculopathy; and hemangiomas of the lumbar spine vertebrae. However, the protrusion of the intervertebral discs in comparison with the previous MRI scan had decreased. It was recommended that the applicant be kept under active observation by the

colony doctors, that she have blood pressure checks two or three times per day and her temperature taken twice per day, and an examination by a neurologist and otolaryngologist was scheduled for 10 January 2012. She was also prescribed betahistine (an anti-vertigo drug), detralex and diacarb (acetazolamide, an inhibitor used to treat a variety of illnesses including glaucoma, epileptic seizures and altitude sickness and which also functions as a diuretic); and, in case of necessity, symptomatic treatment, therapeutic exercise and medical massage.

117. On 14 February 2012 the applicant was examined by German doctors from the Charité Hospital in Berlin who recommended, on 17 February 2012, her transfer to a specialised hospital for additional examination and treatment.

118. On 23 February 2012 the applicant underwent additional examinations.

119. On 7 March 2012 a joint meeting of Ukrainian and German doctors took place in order to reach a common approach to the applicant's treatment. According to the Government, upon the recommendations of the German doctors being received a common plan of comprehensive medical treatment of the applicant was developed. According to the applicant, however, the German doctors were not involved in the discussion and did not sign the recommendations in question.

120. According to Government, on 12, 15, 19, 22 and 26 March 2012 the applicant was offered the opportunity to start the treatment recommended by the German doctors in accordance with the developed plan. However, the applicant refused to undergo that treatment, insisting on her hospitalisation in a civilian hospital, not excluding a German medical institution. She agreed, however, to be hospitalised in a medical institution inspected and recommended by the German doctors.

121. On 14 March 2012 the applicant requested the Court under Rule 39 of the Rules of Court to indicate to the Government that she should be provided with appropriate medical treatment by independent doctors in a specialised institution.

122. On 15 March 2012 the Court applied the interim measure under Rule 39 and requested the Government "to ensure that the applicant receives treatment appropriate to her complaints in an appropriate institutionalized setting".

123. On 16 March 2012 the Government brought medical equipment from nearby hospitals to the prison. On the same date, the applicant was offered a lumbar puncture in the medical ward. She refused to undergo this procedure on the grounds that it was a surgical procedure which ought to be performed in a surgical operating room and the ward did not offer proper, sterile conditions and lacked appropriate medical equipment.

124. On 15, 22, 24 and 25 March 2012 the applicant submitted written requests for medical treatment and complained about the lack of that

treatment to the colony administration. On 26 and 30 March 2012 the head of the administration offered the applicant the opportunity to undergo treatment in the medical unit of the colony and also allowed her to choose between two medical institutions in which to undergo a paravertebral block procedure. The applicant asked to consult the neurologist, Dr P., who had been her doctor in SIZO no. 13 and whose diagnoses had been fully confirmed by the German doctors. The head of the administration refused to allow her to consult Dr P., referring to the conclusions of 7 March 2012 which had allegedly reflected the common position of the Ukrainian and German doctors.

125. On 27 March 2012 the applicant refused to be treated either in the Urgent Medical Treatment and Trauma Centre at the regional clinical hospital or in the M. Sitenko Institute of Spinal and Joint Care, in order to undergo a paravertebral block procedure.

126. The Government noted that on 2 April 2012 the applicant was examined by the medical panel, including the First Deputy Minister of Health and specialists from the O.O. Bohomelets National Medical University and the M. Sitenko Institute of Spinal and Joint Care of the Academy of Medical Sciences. The applicant was prescribed treatment in the Kharkiv Central State Railway Clinical Hospital ("the Central Clinical Hospital"). At the same time, it was explained to her that this institution's facilities complied with the requirements set out by the medical specialists from Germany. The applicant agreed to undergo this treatment.

127. However, on the next day she changed her mind and explained that the Central Clinical Hospital was not a specialized medical institution meeting the requirements contained in the interim measure ordered by the Court on 15 March 2012. She also noted that she would undergo treatment in the above institution only after the German doctors had confirmed that it was able to provide the treatment recommended by them.

128. On 4 April 2012 the applicant was offered a transfer to the Central Clinical Hospital. She was examined by the medical panel. She was told that the panel had visited the Central Clinical Hospital, had found its premises and equipment satisfactory and had concluded that the hospital provided the best conditions for the applicant's treatment. The applicant agreed to be treated there provided that the hospital was assessed by the German doctors, who were expected to arrive on 6 April 2012.

129. Between 13 and 15 April 2012 the German doctors examined the applicant and checked the quality of the hospital proposed by the Government. They accepted the cleanliness of the hospital and the sincere attempts of the doctors there to be open, friendly and respectful, emphasising at the same time that in the short time available to them, they had not been able to assess whether the doctors were able to offer the complex underlying treatment needed.

130. On 17 April 2012 the German doctors delivered their report as regards the appropriateness of the Central Clinical Hospital for the applicant's needs. The report indicated a number of problems with the applicant undergoing the treatment in the Central Clinical Hospital.

3. The incident related to the applicant's transfer to hospital on 20 April 2012 and its investigation

131. In a letter of 20 April 2012 sent to the Government at 4.54 p.m. the Court invited the Government to inform it, by 27 April 2012, what steps had been taken by them to comply with the terms of the interim measure ordered on 15 March 2012.

132. At an unspecified time on the same day a medical panel composed of five doctors visited the applicant. A statement issued on the same day reads as follows:

> "Members of the International Medical Board ... arrived at Kachanivska Penal Colony on 20 April 2012. Accompanied by the staff of Kachanivska Penal Colony, they entered the room where Yu.V. Tymoshenko was being kept proposing to carry out a medical check-up.
>
> While communicating with Yu.V. Tymoshenko, the board members again, with the use of arguments, convincingly and persistently suggested to her that she finally start inpatient treatment, which had been recommended by the International Medical Board and confirmed again by German health professionals on 13 April 2012, at the Central [Clinical] Hospital, where all necessary conditions had been created to make it possible to administer [the necessary] drugs and physical therapy, [and] to adjust, complement and extend [that treatment] if necessary.
>
> While communicating with the board, the prisoner was sitting at the table. She was in the right mood to talk with the health professionals. She read the report regarding the assessment of the hospital by health professionals which had been handed over by the penal colony management.
>
> Members of the medical board, [having] consulted [the relevant report], thoroughly analysed the conclusions of the German doctors regarding their visit to the Central [Clinical] Hospital and Yu.V. Tymoshenko on 13 April 2012 (letter from the Ministry of Foreign Affairs of Ukraine dated 19.04.2012 no. 411/17-994-313), received and discussed information from members of medical staff of Kachanivska Penal Colony regarding the state of health of Yu.V. Tymoshenko, took into account objective evidence provided by the medical staff of Kachanivska Penal Colony regarding the lack of deterioration of the prisoner's state of health; the board also took into account the fact that no additional complaints were received from the prisoner during their communication with her.
>
> The board repeatedly advised hospitalisation [in order for] comprehensive treatment to be carried out. In response, the patient repeatedly stated that she wished to be treated in an inpatient facility. However, she did not specify the date on which such treatment should begin.
>
> Based on all the available medical information, the board jointly arrived at the conclusion that, as of 20 April 2012, the prisoner can be transferred, both to the place of treatment and in other cases provided for by law."

133. On the same day, the head of the medical unit of the Kachanivska Colony ordered the applicant's hospitalisation in the Central Clinical Hospital of the State Railways. Again on 20 April 2012, at about 11 p.m., the applicant was transferred to this hospital. According to her, she objected to the transfer to that hospital as not suitable for her needs, and force was used against her. The applicant claims that, as a result, she was bruised and sustained haematomas on her stomach and a number of haematomas on her arms.

134. More specifically, the applicant's account of the events of the evening of 20 April 2012 is as follows: at about 9 p.m. her cellmate was removed from the cell. Three prison guards came and, after the applicant refused to follow them, they forced her to leave the cell. They wrapped her in a sheet and hit her in the abdomen. Feeling acute pain in her abdomen and spine, the applicant lost consciousness and only woke up in the hospital. She remembered having been carried out to the ambulance by one of the prison guards. Despite the permanent surveillance of her cell, the prison administration claimed that no recording of the incident had been made.

135. According to the applicant, upon her admission to the hospital, she refused to be treated by the hospital staff and asked to contact her lawyer. Moreover, in response to being physically abused by the prison guards, she announced and began a hunger strike. Despite her request, the applicant's lawyer was not allowed to visit her on 21 April 2012.

136. On 22 April 2012 at about 2 p.m. she was returned to the colony.

137. The applicant stated that on 23 April 2012 she had asked to be examined by the prison doctors who, however, had ignored her request. On the same date she had filed a complaint with the Kharkiv Regional Prosecutor's Office about her forced transfer to the hospital and her alleged ill-treatment. She claimed that she had not been allowed to meet with her lawyer under the pretext that a "cleaning day" was taking place in the colony. The lawyer complained to the Kharkiv Regional Prosecutor's Office.

138. Again on 23 April 2012 the applicant asked for a forensic examination to be carried out by an independent expert but, according to her, her request was dismissed by the Kharkiv Regional Prosecutor's office.

139. On 24 April 2012 the applicant was allowed to see her lawyer for the first time since her return to the colony.

140. On the same date she showed her bruises to the colony medical staff. According to their examination report, minor bodily injuries (a bruise on the left forearm and two bruises on the right iliac area) were found on the applicant's body as a result of a compressive blow by, or contact with, blunt solid objects one or two days prior to the applicant's examination. The report also established that the apparent age of the bruises did not coincide with the time indicated by the applicant. Taking into account the locality and number of the applicant's injuries, the report indicated that no less than

one blow had been inflicted in the area of the left forearm, and no less than two, in the area of the abdominal cavity. The report pointed out that the localisation of these bodily injuries was such as for it to have been possible for the applicant to have inflicted them herself.

141. According to the Government, on 24 April 2012 a forensic medical expert was invited to examine the applicant. She, however, refused to allow the suggested examination.

142. Later on the same date the head of investigative department of the Kharkiv Regional Prosecutor's Office refused to institute criminal proceedings against colony staff in the absence of *corpus delicti* in their actions. According to the applicant, the prosecutor admitted, at a press conference, the application of force against her, but considered it to have been justified.

143. On the following day the above refusal was quashed due to the widespread dissemination in the media of information about the bodily injuries which had allegedly been inflicted on the applicant by colony staff. The prosecutor had also received the results of the applicant's examination by the colony medical staff on 24 April 2012 confirming the existence of the bruises. Accordingly, additional investigation was deemed necessary.

144. On 25 April 2012 a representative of the Ombudsman's Office visited the applicant, and on the same date the Ombudsman, Ms Nina Karpachova, made a public statement regarding the applicant's state of health and the fact that she had been physically abused during her forced transfer to the hospital. She stated as follows:

> "Yu. Tymoshenko gave her consent to an examination of her injuries by the Ombudsman's representative in the presence of the governor of Kachanivska Colony. The examination established the presence of bruises on the upper part and near the elbow of the right arm, and a sizable bruise on the right lower part of the stomach.
>
> Yu. Tymoshenko confirmed her statement of 23 April made to the Kharkiv Regional Prosecutor ... and expressed resentment over the absence of any reaction to that statement. She also stated that the Ombudsman had not been informed of her application and [that she had] asked for [the Ombudsman] to immediately visit the colony. In order to verify all the circumstances of the application of physical force to Yu. Tymoshenko, the Ombudsman's representative met with the Kharkiv Regional Prosecutor ... and the Head of the Kharkiv Regional Department of the State Prisons Service of Ukraine.
>
> The Ombudsman is obliged to state that, by the end of the working day on 24 April, the prosecution authorities had not duly responded to Yu. Tymoshenko's application.
>
> The Ombudsman declares that the transfer of Yu. Tymoshenko in such a manner amounts to ill-treatment of a detainee and could be classified as torture in breach of Article 3 of the European Convention of Human Rights ...
>
> In this connection, the Ombudsman demands:
>
> 1. From the Prosecutor General of Ukraine – to open a criminal case and to suspend from their professional duties all those involved in Yu. Tymoshenko's ill-treatment during her transfer from the colony.

2. From the Head of the State Prisons Service of Ukraine – to immediately ensure [the provision of] all necessary medical assistance [to Yu. Tymoshenko] in compliance with the decision of the European Court of Human Rights and the conclusions of the Ukrainian and independent foreign doctors."

145. On the same date the applicant submitted a new request for an interim measure under Rule 39 of Rules of Court, asking that the Government be ordered to immediately use all available means at their disposal to ensure her treatment in the Charité Hospital in Germany.

146. On 26 April 2012 a further offer of a forensic medical examination was made but, according to the Government, the applicant refused to be examined. As a result, the head of Kharkiv Medical Academy's department of forensic medicine, a doctor of medicine, was assigned to evaluate her injuries on the basis of the medical examination report of 24 April 2012. He confirmed that the report had been drawn up in accordance with the relevant requirements. He fully agreed with the doctors' conclusions and noted that, due to the state of the haematomas on 24 April 2012 and their appearance one or two days before the applicant's examination, the injuries could not have been inflicted on 20 April 2012. In addition, having familiarised himself with the medical file, which recorded the applicant's state of health during her detention in Kyiv SIZO no. 13, he noted that recurrent "haematomas" under the skin had appeared from time to time on the applicant's body since 16 August 2011, and had not been a result of external blows and could have resulted from a condition linked to the state of the applicant's vascular and circular systems. The expert also expressed his opinion on the photographic materials published in the media, noting, in particular, that the photos on which the opinions expressed in the media were based could not be the subject of any standalone assessment, and that, in general, any opinions based on the photos would be ill-founded.

147. According to the applicant, the forensic expert wrote a report in which he summarized that her bodily injuries were "self-inflicted". She refused to sign the report, as she felt it had wrongly presumed that her injuries could have been "self-inflicted". She asked for a forensic examination to be carried out by an independent doctor, but her request was rejected by the Kharkiv Regional Prosecutor's Office.

148. On 27 April 2012 the Ombudsman published pictures of the applicant's bruises. On the next day, the Kyiv City Prosecutor Office allegedly searched the Ombudsman's office and served writs on a number of her staff members who had been involved in reporting on the applicant's physical injuries in the colony. According to the applicant, the Government declared that Ms Nina Karpachova had forced her staff to make a false statement about the bruises on the applicant's body, without mentioning any names or sources for that statement.

149. On 3 May 2012 the investigator at the prosecutor's office again refused to institute criminal proceedings against colony staff due to the

absence of any indication of a crime in their actions. He noted in his decision, *inter alia*, the following:

> "On 24.04.2012, upon referral by the Oblast prosecutor's office, in a residential area of the colony, expert in forensic medicine SERBINENKO I.Yu. offered Tymoshenko Yu.V. to have a forensic medical examination. She flatly refused ...
>
> On 26.04.2012, at 7.55, Tymoshenko Yu.V., again, flatly refused having a forensic medical examination with participation of SVENTITSKA S.G, head of the forensic medicine department at Kharkiv Oblast Forensic Medicine Centre ...
>
> ...
>
> Copies of written requests by Tymoshenko Yu.V., dated 24.04.2012, in which she asks to carry out her examination aimed at registration of her injuries by the staff of the colony, with presence of the prosecutor and indicates her unwillingness to be examined by the expert in forensic medicine Serbinenko I.Yu., were added to the materials of the investigation. In the same documents, Tymoshenko Yu.V., with her own hand, indicated that staff of Kachanovska Correctional Colony no. 54 (doctor on duty Malyuga V.A., nurse on duty Rodina V.I., head of the medical unit Tsyura O.M., senior police operative at the operation branch Makarenko A.M.) examined her, and all her injures, as of 24.04.2012 were documented, and all the relevant data were entered into her medical records. ..."

150. According to the Government, in order to establish the circumstances of the applicant's transfer to the hospital on 20 April 2012, her return to the colony on 22 April 2011 and her bodily injuries, the investigator had collected evidence from the head of the colony and fourteen other colony employees, two medical workers and two ambulance drivers who had been on duty, six members of the medical panel, two employees of the hospital and other individuals.

151. The head of the colony stated that on 20 April 2012 he had granted permission for the applicant's transfer to the hospital. He had then given instructions to the deputy head of the colony (also head of the security department) and another deputy head of the colony to ensure the applicant's transfer. He had been informed that the applicant had not objected to her transfer and had not complained of the infliction of any injuries. On 22 April 2012 the applicant had been visited by the colony medical staff on duty, who had observed no injuries on her body, while the applicant herself had made no statement about having suffered any injuries. The head of the colony had not given any instructions to his subordinates to use physical force on the applicant.

152. The deputy head of the colony stated that on 20 April 2012 he had been helping the applicant to come down the stairs to the ambulance and had accompanied her to the hospital. As she slowly descended the stairs from the second floor to the first, the applicant had told him that she was tired and had allowed him to carry her. He had carried the applicant to the ambulance, had placed her on a stretcher and had helped the driver to put the stretcher into the ambulance. He made it clear that no bodily injuries had

been inflicted on the applicant in his presence. Similar statements were also given by the other deputy head of the colony and by a senior inspector.

153. The head of the colony medical department stated that on 20 April 2012 at about 7 p.m., he and two deputy heads of the colony had gone to the applicant's cell and had informed her that she was to undergo an examination and to be hospitalised. He had asked her to gather together her personal belongings. At about 9.30 p.m. the applicant had been put into the ambulance. During her transfer to the hospital, she had not expressed any complaints that bodily injuries had been inflicted on her. The head of the colony medical department stated that the applicant had not lost consciousness. Once the ambulance had arrived at the hospital, the applicant had been advised to undergo an initial medical examination, but she had refused to do so. On 23 April 2012 at about 9.30 a.m. colony medical staff had gone to see the applicant, who had refused to undergo a medical examination. She had not made any complaints and the staff had not found any injuries on her body. At approximately 8.39 a.m. on 24 April 2012, in the course of their visit, changes had appeared on the applicant's skin and she had allowed the medical officers to examine them. The head of the colony medical department noted, however, that she had categorically refused to allow a forensic examination of her injuries. Evidence to the same effect was also given by the colony's doctor, by the colony's duty doctor and by the nurse.

154. Guards from the colony's surveillance and security department stated that on 20 April 2012 they had been on day duty in department no. 1 of the colony, where the applicant's cell was situated. The department was equipped with video cameras working in real-time mode but without a recording function. While viewing the applicant's cell on the monitor, one of the inspectors said that he had seen no use of physical violence on the applicant by the members of colony staff who had visited her; nor had he heard any noises. Once the staff members had left the cell, the inspector had seen on the screen that the applicant had taken a shower, had gathered her belongings together and had got into bed. In the course of the video surveillance, the guards had not noticed that the applicant had sustained any bodily injuries.

155. A cardiologist and paramedic working as part of the emergency team and the ambulance driver submitted that on 20 April 2012 they had arrived at the colony in the evening. They had seen a young man carrying the applicant in his arms from the doors of the exercise yard and placing her on the stretcher. They had not noticed any injuries on the applicant's body.

156. The colony staff involved explained that at about 10 p.m. on 20 April 2012 they had entered the ambulance to take the applicant to the hospital and had later accompanied her to a ward on the ninth floor. The applicant had not made any complaints in their presence. According to them, no-one had inflicted any bodily injuries on her.

157. The doctor and ambulance driver stated that they had been on duty on 22 April 2012. After their arrival at the hospital at about noon the applicant had been carried out on a stretcher and placed on the gurney.

158. The Deputy Minister of Health stated that the applicant had been driven to the colony accompanied by police vehicles. She had not made any complaints to the persons involved and they had not noticed that she had any bodily injuries. She stated that on 20 April 2012 the medical panel had advised the applicant to start the treatment at the hospital. The applicant had not refused the treatment but had wanted to consult her lawyer. At about 10.40 p.m. she had been brought to the hospital, but the witness did not know the specific details of her transfer. She knew that from 20 to 22 April 2012 the applicant had been refusing to allow any kind of medical examination or treatment. During her visit to the applicant, the latter had not made any complaints and there had been no bodily injuries on any visible part of her body. Evidence to the same effect was given by other members of the medical panel.

159. The hospital doctors stated during their questioning that after the applicant's arrival at the hospital at 10.40 p.m., she had immediately been hospitalised. During her admission there she had refused to allow any medical examination of her. On 21 April 2012 she had only complained of pain in her back and a headache; she had not made any other complaints.

160. The applicant's cellmate stated that in the afternoon of 20 April 2012 colony staff had come into the cell and had notified the applicant that permission had been granted to hospitalise her. The applicant had refused to be transferred to the hospital, but the head of the colony medical department had asked her to be prepared to be transferred. The cellmate was asked by the applicant to prepare what was necessary in case it would be needed. The applicant's cellmate went on to explain that at about 9.00 p.m. staff had taken her out of the cell and had accompanied her to the medical unit.

161. In the course of the inquiry, prisoners who were serving sentences in the colony and who had occupied cells next to the applicant's cell were questioned. They stated that in the evening of 20 April 2012 they had not heard any cries or other noise.

4. Subsequent developments in the applicant's medical treatment

162. On 4 May 2012 the applicant informed the Court that Ukrainian legislation did not provide for the possibility of outside doctors (either Ukrainians or foreigners) to take part in treatment in a particular hospital if they were not employed by it.

163. On the same date the Government informed the Court that they would grant an exemption to the aforesaid rule and allow the German doctors to join the Ukrainian medical team from the Central Clinical Hospital and be involved in the applicant's medical treatment, which was to start on 8 May 2012.

164. On 9 May 2012 the applicant was transferred to the Central Clinical Hospital, where she started her medical treatment under the supervision of a German neurologist. On the same date she ended her twenty-day hunger strike.

165. In a letter of 12 May 2012 the applicant's lawyer stated that the applicant had been under round-the-clock video surveillance, even while undergoing medical procedures. The prison authorities had also allegedly published a full report of the applicant's medical history in the Ukrainian media and released video recordings which the lawyer claimed had been taken in her prison cell.

166. According to a report made by the German doctor regarding the treatment of the applicant between 7 and 17 May 2012, the termination of her hunger strike had been slow but successful and had allowed the commencement of some physiotherapeutic measures. However, the disclosure on the television of her diet and treatment on 15 May 2012 had triggered her strong indignation. As a result, the applicant had interrupted her treatment and had even contemplated completely refusing to follow it and returning to the prison. She had been convinced to continue the treatment under the condition that no doctors not directly involved in it would be present at the regular doctors' consultations conducted in the hospital.

167. On 16 May 2012 the applicant filed a criminal complaint concerning her permanent surveillance in the hospital and publication of the confidential information concerning her state of health. On 1 June 2012 the prosecutor notified the applicant that there were no grounds to take any prosecution measure in this respect.

168. On 27 May 2012 the German doctor issued another report covering the applicant's treatment between 21 and 27 May 2012. He noted the cooperative attitude of the Central Clinical Hospital doctors, who had been taking due note of his recommendations. As also noted in the report, the applicant had confidence in the competence and good faith of the hospital's medical staff. The doctor further indicated the progress of the therapy and an increase in the applicant's free time to three-and-a-half hours daily. At the same time, he pointed out that the applicant was under stress owing to the permanent video surveillance and presence of a security guard in her ward. He specified that the applicant had only been screened off from the video cameras using a curtain during his visits. This had often only taken place following his reminders. The guard had stayed in the ward during all medical procedures. Lastly, the doctor noted that the applicant had continued to refuse to allow any laboratory blood analysis to be conducted in Ukraine and therefore considered the possibility of that analysis being conducted in Germany.

169. On 31 May 2012 the interim measure applied on 15 March 2012 was lifted, following the Government's request of 21 May 2012. On the

same date, the applicant's second request for an interim measure, made on 25 April 2012, was rejected.

170. On 1 June 2012 the German doctor issued another report on the applicant's treatment, in which he summarised the impediments to its success as follows:

- the applicant had accumulated, over the preceding eight months, profound mistrust towards Ukrainian doctors because they were civil servants, and was refusing to receive any treatment from them or to allow any blood samples to be taken for analysis;
- it was impossible to have confidential doctor-patient conversations with the applicant – an essential part of the requisite therapy – because of the permanent video surveillance and the presence of a security guard and another inmate whose connection with the State authorities remained unclear;
- there had been breaches of confidentiality relating to examination results, diagnoses and medical prescriptions (for example, the reports made by the German doctors had been disclosed on the Internet without the agreement of the applicant or the doctors);
- the applicant was refusing to allow any medical measures requiring physical intimacy for fear of being discredited in the eyes of the public by the disclosure of the video records; and
- interdisciplinary therapy was difficult to organise given the Charité Hospital's inability to send a full team of doctors.

171. According to a letter sent by the Government dated 11 July 2012, the information which had been disclosed in the media had concerned the applicant's diet and the scheduling of her medical procedures and had not been, contrary to her allegations, confidential. They also denied that it had contained any information concerning the applicant's state of health and the nature of the medical procedures she had been undergoing.

172. On 8 June 2012 the applicant brought an administrative action before the Kyiv District Administrative Court, which she further complemented on 31 August, 21 September, 17 October and 24 October 2012. The applicant requested the court (*i)* to recognise as illegal the actions by officials of the State Penitentiary Service and of the Kachanivka Colony on the failure to fulfil her right to make telephone calls in accordance with Article 110 of the Criminal Code; (ii) to oblige the State Penitentiary Service and the Kachanivka Colony to meet the requirements of Article 110 of the Criminal Code by providing her a right to telephone calls including on the territory of the Central Clinical Hospital of the State Railway; (iii) to recognise as illegal the actions of the officials of the State Penitentiary Service and the Ministry of Health on the dissemination of confidential information regarding her and the state of her health; (iv) to prohibit the Ministry of Health and the State Penitentiary Service from disclosing confidential information regarding her and the state of her health in the

future; (v) to recognise as illegal the actions of the officials of the Kachanivka Colony and the Main Department of the Ministry of the Interior in the Kharkiv region of installing video cameras including hidden ones on the ninth floor of the Central Clinical Hospital of the State Railway and the video surveillance of the applicant; (vi) to recognise as illegal the actions of the officials of the Kachanivka Colony of filming the applicant in the Central Clinical Hospital of the State Railway; (vii) to bind by a commitment the Kachanivka Colony and the Main Department of the Ministry of the Interior in the Kharkiv region at the entry into force of the decision to cease surveillance and remove surveillance equipment that is located on the ninth floor of the Central Clinical Hospital of the State Railway where she was accommodated; (viii) to recognise as illegal the actions of the officials of the Main Department of the Ministry of the Interior in the Kharkiv region in the implementation of public order, establishing barriers that impede the access of citizens to the ninth floor of the Central Clinical Hospital of the State Railway; and (ix) to recognise as illegal the actions of the officials of the Kachanivka Colony in providing male security officers at the Central Clinical Hospital of the State Railway.

173. In a judgment of 30 October 2012 the Kyiv District Administrative Court dismissed the applicant's administrative application. In respect of the applicant's complaint concerning the dissemination of the confidential information of her health condition the court stated as follows:

> "The Ministry of Health of Ukraine denied the claim in this part on the grounds that the information about the plaintiff's health condition is public, due to social publicity the information was given precisely in order to inform the public about important facts concerning the life and activities of a public person. The defendant states the press-release given on 16.02.2012 contains information about the activities of an established commission and the results of its work. The Ministry of Health further argues that the statement of the Minister is a comment on information which had been previously published in mass media.
>
> ...
>
> The State Penitentiary Service of Ukraine denies the illegality of the disclosures of the above information, referring to the fact that this information was published to refute a statement released in the media and in the Internet. Specifically, the defendant states that information disseminated in the Internet on 25.11.2011, 01.12.2011, 08.12.2011, 13.02.2012, 17.02.2012, 27.02.2012, 09.03.2012, 23.03.12, reported the health status of the plaintiff, appeals of citizens, deputies and foreign diplomats to the defendant about the plaintiff's health.
>
> ...
>
> Having reviewed the materials submitted by the parties, the Court concludes that the information about the health condition and the fact of the plaintiff's appeal for medical treatment was first disseminated by persons authorized by the plaintiff.
>
> In particular, the case file contains a copy of the power of attorney dated 31.03.2011, registered under number 165 and issued by the plaintiff to Mr Sergii

Volodymyrovych Vlasenko. By this power of attorney the plaintiff authorizes the mentioned person to provide judicial actions on her behalf.

Also, the case file contains a copy of the document signed on 17.02.2012 and addressed 'To whom it may concern', by the meaning of which Sergii Volodymyrovych Vlasenko and Eugenia Olexandrivna Tymoshenko were entitled to communicate with foreign and Ukrainian doctors, to make decisions on behalf of the plaintiff on full or partial withdrawal of the confidentiality of any data and results of medical examinations, including public disclosure and any other action with this information and data. This copy of the document contains the signature and decryption of the signature "Tymoshenko".

The mentioned copy of the document was added to the case file in the court hearing of 30.07.2012 by a motion of the plaintiff's representative S.V. Vlasenko.

The case file confirmed that information regarding the plaintiff's health condition was disseminated by the above persons who had been authorized to do so by the plaintiff, since November 2011.

Given that information was distributed by the plaintiff's authorized representatives, with whom the plaintiff continues to work and not withdrawing the power of attorney dated 31.03.2011, registered with number 165 and without notification about the cancellation of the right to disseminate information, the court finds that the dissemination of information on Y. Tymoshenko's health condition and the fact of request for medical help was agreed with her and did not violate the legitimate rights and interests, including rights under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

...

The Court ascertains that the dissemination of information by Yulia Tymoshenko's authorized representatives about the health condition of the plaintiff draw a wide public response and heightened public interest in the country and abroad, as Mrs Yulia Volodymyrivna Tymoshenko is one of the prominent politicians and public figures of Ukraine during 1999-2011 years.

...

Accordingly, the aggregate of these facts gives a reason to believe that Mrs Yulia Volodymyrivna Tymoshenko is a public figure of the socio-political activities of Ukraine, whose life and activity causes heightened public interest of the public and media, both in Ukraine and in other countries.

The Court considers that the defendants had disseminated information about the refusals of the medical examination and conditions of detention in accordance with article 20 of the Law of Ukraine On Information, which establishes that the information with restricted access might be disseminated, if it is socially necessary, that is a subject of public interest and the right of the public to know this information prevails on the potential harm from its dissemination.

...

Instead, the defendants did not disseminate information on plaintiff's diagnosis, the results of her examination or prescribed medical procedures, all disseminated information did not contain any names or other indications, which can identify the plaintiff's disease.

Having considered the publications, which were added to the defendant's objections, the panel of judges concluded that disseminated information by the defendants did not

go beyond the previously directly defined boundaries by authorized representatives of the plaintiff and journalists who publicly provide adequate announcements and comments on various aspects of the health of Mrs Yulia Volodymyrivna Tymoshenko and the circumstances of her residence in the hospital. The Court considers that the information referred to by the plaintiff in proving her claims was given by the defendants in response to the initial comments of the plaintiff's representatives in order to inform the public about the objective state of affairs, including responses to comments by Mrs Yulia Volodymyrivna Tymoshenko's representatives.

Considering the injury of the plaintiff's interests by dissemination of information about her, the Court concludes that the dissemination of information about health can not be considered as an invasion of privacy or a disclosure of information.

According to the court, the dissemination of information about the circumstances regarding the plaintiff, including measures that were not conducted on the plaintiff, including because of the refusal, does not violate the rights of the plaintiff.

174. In response to the applicant's complaint on the unlawfulness of the video surveillance at the hospital, the court gave the following reasoning:

"According to Article 103 of the Penal Code of Ukraine, the administration of the colony may use audiovisual, electronic and other technical equipment to prevent escapes and other crimes, violations of established by law procedures of detention, to obtain necessary information about the behaviour of inmates. The administration of the colony shall inform prisoners about the use of equipment for surveillance and control. A list of surveillance and control equipment and the protocol of their application is determined by regulations of the central executive body of penitentiaries.

The panel of judges considers that this legal provision permits video surveillance of convicts, which is one of the measures in detention and control of convict's behaviour. Such restrictions on the rights of the sentenced persons are directly stipulated by the Penal Code of Ukraine.

The plaintiff's references in the court proceedings to surveillance by male security officers during the medical procedures and to surveillance with recorded camera images have not been proved. In this regard, the panel of judges has taken into account the expert opinion dated 22.10.2012, No. 26, according to which the file 'Тимошенко в больнице.flw'1, provided for research by the State Penitentiary Service of Ukraine, was not recorded on video-tape.

Given that the panel of judges reaches the conclusion that the actions of the defendants in video surveillance were legal.

With regard to the video surveillance provided by the Main Department of the Ministry of Internal Affairs of Ukraine in the Kharkiv region, the court assumes that, given the location of cameras which were set by the mentioned defendant, the plaintiff is not under video surveillance of the MIA of Ukraine in the Kharkiv region. Conducting video surveillance by this defendant with the purpose to protect public order does not violate the rights of the plaintiff and meets the requirements of the current legislation.

The panel of judges considers that surveillance over the movement of an unlimited number of persons, including the plaintiff, in the corridors of the hospital, is conducted legally and does not violate the rights of the plaintiff.

[1] Tymoshenko in the hospital.

The Court concludes that the actions of the Main Department of Internal Affairs of Ukraine in the Kharkiv region on establishing barriers that impede the access of citizens to the ninth Floor of the STPI Ukrainian Railways Central Clinical Hospital does not violate the plaintiff's rights, since the plaintiff is limited in movement because of the status of a sentenced person. Herewith, the restriction of the plaintiff to move freely in her hospital room, which is not disputed by the parties, denied the violation of the plaintiff's limited access to the floor."

II. RELEVANT DOMESTIC LAW AND PRACTICE

175. Criminal Code 2001

Article 364. Abuse of power or office

"1. Abuse of power or office, namely the intentional use, for financial gain or with another personal interest or in the interest of third parties, by an official of his/her power or office against the interests of the service, if it has caused serious damage to the State or the public interest or to the lawful interests, rights and freedoms of natural or legal persons, –

shall be punishable by ...

2. The same acts, if they caused grave consequences, –

shall be punishable by ..."

Article 365. Exceeding authority or official powers

"1. Exceeding authority or official powers, namely the intentional commission of acts by an official which go manifestly beyond the scope of the rights and powers vested in him or her and which cause serious damage to the State or the public interest or to the lawful interests, rights and freedoms of natural or legal persons –

shall be punishable by ...

2. Exceeding authority or official powers combined with violence or use of a weapon, or combined with humiliating acts or acts causing pain to the victim, provided that such acts do not fall within the scope of torture, –

shall be punishable by ...

3. Acts as described in paragraphs 1 or 2 of this Article, if they have caused grave consequences, –

shall be punished by imprisonment for seven to ten years with a prohibition of up to three years on occupying certain posts or carrying out certain activities."

176. Code of Criminal Procedure 1961

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 from attempting to abscond from an inquiry, investigation or the court, from obstructing the establishment of the truth in a criminal case or pursuing criminal activities, and in order to ensure the execution 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 fails to comply with procedural decisions, or obstructs the establishment of the truth in the case or pursues criminal activities. ...”

Article 165-2. Procedure for selection of a preventive measure

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

If a body of inquiry [or] investigator considers that there are grounds for remand in custody [it or] he shall, with the prosecutor’s consent, submit an application to the court. A prosecutor is entitled to submit a similar request. When considering the matter the prosecutor shall familiarise himself with all the material containing grounds for remand in custody, check whether the evidence was lawfully obtained and whether it is sufficient to bring charges [against the suspect].

The application shall be considered within seventy-two hours of the arrest of the suspect or accused.

If the application concerns the remand in custody of a person who is at liberty, the judge shall have the power to issue a warrant for the arrest of the suspect or accused and his escort to the court. In such a case, the detention shall not exceed seventy-two hours, or, if the person concerned is outside the locality in which the court operates, [the detention] shall not exceed forty-eight hours from the time the arrested person was brought to the locality.

Upon receipt of an application, the judge who is assigned [to the case] in accordance with Article 16-2 of this Code shall study the materials of the criminal case file submitted by the body of inquiry, investigator [or] prosecutor, question the suspect or accused, and, if necessary, obtain explanations from the person dealing with the case, hear the prosecutor, [and] the defence lawyer if [the latter] has appeared before the court, and deliver an order:

(1) refusing the preventive measure, if there are no grounds for its application;

(2) ordering the remand in custody of the suspect or accused.

The court shall only decide on the remand in custody of a person in his absence if that person is on the international wanted list. In such cases, after the arrest of the person and no later than forty-eight hours from the time of his transfer to the place where the proceedings are pending, the court, with the participation of the person [concerned], shall consider [whether to] apply a preventive measure in the form of remand in custody or [whether to] change [such a measure] and shall issue an order accordingly.

If the court has refused to remand the suspect [or] accused in custody, it shall have the power to apply a non-custodial preventive measure to him or her.

The court’s order may be appealed against to the court of appeal by the prosecutor, suspect/accused, his defence or representative within three days of its delivery. The introduction of an appeal shall not suspend the execution of the court’s order.

If remand in custody requires reviewing additional information concerning the character of the arrested person or ascertaining other circumstances of importance in order for a decision to be taken on this issue, the judge may extend the period of detention for up to ten days, or, upon the request of the suspect/accused for up to fifteen days, and shall issue an order accordingly. Whenever it is necessary to decide

this issue in respect of a person who has not been arrested, the judge may defer consideration of the matter for up to ten days and take measures to ensure his/her good behaviour during this time or may order the arrest of the suspect or accused for this period."

Article 274. The selection, discontinuation and change of a preventive measure by the court

"In the course of the consideration of a case the court may issue a ruling changing, discontinuing or selecting a preventive measure in respect of a defendant, if there are grounds for this.

The procedure for selecting detention as a preventive measure shall be governed by the relevant provisions of Chapter 13 of the Code."

177. Code on the Enforcement of Sentences 2003

Article 103. Technical means of surveillance and control

"1. The administration of a colony has the right to use audio, visual, electronic and other technical means in order to prevent escape and other crimes by inmates, breaches of the prison rules, or in order to obtain necessary information about the behaviour of inmates.

2. The administration of a colony shall inform inmates about the use of technical means of surveillance and control.

3. The list of technical means of surveillance and control and the procedure for their use shall be established by regulations of the [Prisons Service of Ukraine]. ..."

Article 106. Grounds for use of force [...]

"1. Physical force ... may be used against inmates with a view to putting an end to physical resistance, violence, rowdiness (*буйство*) and opposition to lawful orders of the colony administration, or with a view to preventing prisoners from inflicting harm on themselves or on those around them.

2. The use of force should be preceded by a warning if the circumstances so allow. ...

4. If the use of force cannot be avoided, it should not exceed the level necessary for fulfilment by the officers of their duties, should be carried out so as to inflict as little injury as possible and should be followed by immediate medical assistance if necessary. Any use of force must be immediately reported to the prison governor. ..."

Article 107. Rights and duties of prisoners

"1. Prisoners have the right to ... receive medical assistance and treatment, including medical services paid for at their own or their relatives' expense. ..."

Article 116. Medical and sanitary services for prisoners

"...

5. Prisoners may seek, at their own or at their relatives' expense, medical assistance, including treatment, from civilian medical institutions. In such cases, medical assistance is to be provided at the medical unit of the colony in which the

prisoner is serving his/her sentence, under the supervision of the colony's medical staff."

178. Health Care Act 1992

Article 6. Right to health care

"Every citizen of Ukraine has a right to health care, which includes:

(a) living standards, including food, clothing, accommodation, medical services and care which are necessary for maintaining a person's health;

(b) qualified medical and/or welfare assistance, [which] includes the free choice of a doctor [and] methods of treatment in accordance with a physician's recommendations ...

(e) correct and timely information about his/her state of health and the state of health of the population, including potential risk factors and the scale of their severity;

(f) compensation for injuries to health;

(g) the possibility of an independent medical examination if a person disagrees with the conclusions of state medical experts, a prohibition on enforced treatment or any [other] activities which might violate a person's rights and freedoms ..."

179. Pre-Trial Detention Act 1993

Article 11. Welfare and Medical Care of Persons in Custody

"Persons remanded in custody shall be provided with living conditions which comply with sanitary and hygiene requirements.

The standard size of a cell cannot be less than 2.5 square metres per person ...

Persons under arrest under the regulations of the Cabinet of Ministers are entitled to free food, a personal sleeping space, bedding, and other necessities. Where appropriate they shall be provided with clothing and shoes ....

Health care and rehabilitation services, ... are organized and provided in accordance with the Health Care Act.

The order of granting health services to persons under arrest, using hospitals, and examinations by physicians shall be determined by the [State Prisons Service] of the Ministry of Defence and the Ministry of Health."

180. The Ukrainian Cabinet of Ministers' Resolution no. 336 of 16 June 1992 "On Food and Nutrition Standards for Persons Detained in State Prisons Service Prisons and Pre-Trial Detention Centres or in Temporary Police Detention Facilities, Reception Centres and Other Temporary Remand Centres of the Ministry of the Interior" establishes detailed nutrition standards for detainees and prisoners, according to which the daily nutrition value should be 3,026.2 kCal.

181. Code of Administrative Justice of 6 July 2005 (in force from 1 September 2005):

Article 2. Role of the administrative justice system

"1. The role of the administrative justice system shall be the protection of the rights, freedoms and interests of physical persons and the rights and interests of legal entities in the field of public-law relations from violations by public authorities ...

2. Any decisions, actions or inaction on the part of public authorities may be appealed against to the administrative courts, except for cases in which the Constitution and laws of Ukraine provide for a different procedure of judicial appeal against such decisions, actions or inactivity ...

3. In cases where the decisions, acts or inactivity of a public authority are being challenged, the courts shall review whether [the impugned decisions and acts] have been adopted or taken:

...

(6) reasonably;

...

(8) proportionately, in particular, by ensuring a necessary balance between any possible unfavourable outcome for an individual's rights, freedoms and interests and the aims the impugned decision or action seeks to achieve;

..."

Article 6. The right to judicial review

"1. Everyone has a right to apply to the administrative courts, in accordance with the procedure envisaged by this Code, if he or she considers that his/her rights or interests are breached by a decision of a public authority, or its actions or inactivity. ..."

Article 8. The rule of law

"1. When considering a case, a court shall be governed by the principle of the rule of law, which provides, in particular, that a human being and his or her rights and freedoms shall be the highest social value and shall determine the essence and orientation of the activity of the State.

2. A court shall apply the principle of the rule of law by taking into account the case-law of the European Court of Human Rights. ..."

Article 17. Jurisdiction of administrative courts in deciding administrative cases

"1. The jurisdiction of the administrative courts shall cover legal relationships arising in the course of the exercise of public administrative powers by ... public authorities and [legal relationships arising] in the course of the public formation of a ... public authority by way of an election or referendum.

2. The jurisdiction of the administrative courts shall cover public-law disputes, in particular:

(1) disputes between physical persons or legal entities and ... public authorities concerning the decisions of the latter (normative legal acts or legal acts of individual effect), or their actions or inactivity;

..."

Pursuant to Article 117, an administrative court may suspend a disputed decision by way of application of an interim measure, on an initiative of the party to procedure. A measure may be applied if there exists a real danger of harm to the plaintiff's rights, freedoms and interests, or if there are grounds to believe that a failure to apply the measure would render impossible the protection of such rights, freedoms and interests or would require considerable efforts and expense for their restoration. An interim measure can also be applied if it is evident that the contested decision is unlawful.

According to Article 162 of the Code, the administrative court, should it find an administrative claim substantiated, may (amongst other things) declare the impugned action, omission or decision unlawful, invalidate the decision in question and/or oblige the defendant to undertake, or abstain from taking, certain actions. It may also order the defendant to pay compensation for the damage caused by the unlawful action, omission or decision.

182. The issue of compensation for unlawful detention in Ukraine is regulated by the Act "On the procedure for compensation for damage caused to citizens by the unlawful acts of bodies of enquiry, pre-trial investigation authorities, prosecutor's offices and courts" of 1 December 1994 ("the State Compensation Act"). The relevant provisions of the State Compensation Act (as worded at the relevant time) can be found in the judgments in the cases of *Afanasyev v. Ukraine* (no. 38722/02, § 52, 5 April 2005) and *Klishyn v. Ukraine* (no. 30671/04, §§ 49-50, 23 February 2012).

III. RELEVANT MATERIALS OF THE COUNCIL OF EUROPE

183. Recommendation Rec(2006) 2 of the Committee of Ministers of the Council of Europe to member States on the European Prison Rules reads, insofar as relevant, as follows:

> "...
>
> 4. Prison conditions that infringe prisoners' human rights are not justified by lack of resources.
>
> ...
>
> 10.1 The European Prison Rules apply to persons who have been remanded in custody by a judicial authority or who have been deprived of their liberty following conviction.
>
> ...
>
> 18.1 The accommodation provided for prisoners, and in particular all sleeping accommodation, shall respect human dignity and, as far as possible, privacy, and meet the requirements of health and hygiene, due regard being paid to climatic conditions and especially to floor space, cubic content of air, lighting, heating and ventilation.
>
> 18.2 In all buildings where prisoners are required to live, work or congregate:

a. the windows shall be large enough to enable the prisoners to read or work by natural light in normal conditions and shall allow the entrance of fresh air except where there is an adequate air conditioning system;

b. artificial light shall satisfy recognised technical standards;

...

18.3 Specific minimum requirements in respect of the matters referred to in paragraphs 1 and 2 shall be set in national law.

18.4 National law shall provide mechanisms for ensuring that these minimum requirements are not breached by the overcrowding of prisons.

...

19.3 Prisoners shall have ready access to sanitary facilities that are hygienic and respect privacy.

19.4 Adequate facilities shall be provided so that every prisoner may have a bath or shower, at a temperature suitable to the climate, if possible daily but at least twice a week (or more frequently if necessary) in the interests of general hygiene.

...

21. Every prisoner shall be provided with a separate bed and separate and appropriate bedding, which shall be kept in good order and changed often enough to ensure its cleanliness.

22.1 Prisoners shall be provided with a nutritious diet that takes into account their age, health, physical condition, religion, culture and the nature of their work.

22.2 The requirements of a nutritious diet, including its minimum energy and protein content, shall be prescribed in national law.

22.3 Food shall be prepared and served hygienically.

22.4 There shall be three meals a day with reasonable intervals between them.

...

27.1 Every prisoner shall be provided with the opportunity of at least one hour of exercise every day in the open air, if the weather permits.

..."

184. The relevant extracts from the Report to the Ukrainian Government on the visit to Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 9 to 21 September 2009 (published on 23 November 2011) read as follows:

"5. Conditions of detention of the general prison population

a. pre-trial establishments (SIZOs)

i) the SIZO in Kyiv

100. The SIZO in Kyiv occupies a complex of buildings in one of the central areas of Kyiv. Some of the detention buildings had been constructed some 140 years previously. Three smaller, more recent blocks provided accommodation for sentenced

working prisoners, women and juveniles. A new block for women was in the process of construction, but that process had virtually been halted due to lack of resources.

With an official capacity of 2,950 places, on 8 September 2009 the establishment was holding 3,440 inmates, including 217 women and 69 juveniles. The vast majority of the inmate population was on remand. The establishment was also holding 297 inmates awaiting the outcome of their appeal (including 41 life-sentenced prisoners), 93 prisoners in transit and 100 sentenced inmates assigned to work in the prison's general services and maintenance. Further, there were 11 inmates who had been subject to forensic psychiatric assessment and who were awaiting a final decision concerning their criminal responsibility. The prisoner population comprised 210 foreign national prisoners (of whom 170 were from countries of the Commonwealth of Independent States).

Since 2001, following amendments to the CC, a section referred to as an "arrest house" had been set up for first-time offenders serving sentences of up to 6 months.

...

103. Material conditions prevailing in the section for women were somewhat better [than those in the section for men]. In particular, the cells were less overcrowded (e.g. 6 inmates in a cell measuring 8 m²; 16 prisoners in a cell measuring 27 m²). The cells had good access to natural light, but ventilation was inadequate and prisoners complained that in the summer the cells became very hot. The in-cell sanitary annexes were fully partitioned and had both cold and hot water taps. Some of the cells had been decorated by the inmates themselves and gave a homely impression.

...

104. The section for sentenced working prisoners provided the best conditions of detention in comparison with the other sections. The dormitories were adequately lit, well ventilated and clean. They were suitably furnished (beds, tables and chairs or stools, some shelves and lockers) and inmates could have their own radio or television. Further, the section comprised a sports hall, a spacious "club" where prisoners could watch films and play table tennis, and a chapel.

105. The prison did not provide inmates with personal hygiene products other than soap. As mentioned in paragraph 88, access to the shower was limited to once a week.

As regards food, prisoners were provided with three meals a day. The quantity of the food appeared to be sufficient, but many prisoners complained about its poor quality and lack of variety. In particular, there was no fresh fruit, eggs or milk (not even for juvenile prisoners). To supplement their diet, prisoners relied to a great extent on food parcels from their families and purchases from the prison shop.

...

The SIZO had a library with a collection of some 27,000 books. The delegation was surprised to learn that remand prisoners were not allowed to receive books (other than the Bible) or newspapers from outside. The CPT would like to receive the Ukrainian authorities' comments concerning this prohibition.

The only regular out-of-cell activity was outdoor exercise of one hour per day, which took place in a series of exercise yards located on the top of the accommodation blocks. By virtue of their size and configuration, these high-walled, bare areas (measuring between 16 and 60 m²) did not allow prisoners to exercise themselves physically.

The CPT recommends that the Ukrainian authorities make strenuous efforts to offer organised out-of-cell activities (work, recreation/association, education, sport) to prisoners at the Kyiv SIZO. Further, the Committee recommends that steps be taken to construct more appropriate exercise yards which allow prisoners to exert themselves physically, as well as indoor and outdoor sports facilities.

...

6. Health care

a. introduction

123. In the course of the 2009 visit, the delegation was informed of a proposal to set up a working group to study the transfer of prisoners' health care to the Ministry of Health. The CPT can only encourage this initiative, which is consistent with the remarks made in paragraph 142 of the report on its 1998 visit, namely that a greater involvement of the Ministry of Health in the provision of health-care services in prison will help to ensure optimal health care for prisoners, as well as implementation of the general principle of the equivalence of health care with that in the outside community. The Committee wishes to be informed of the action taken on the above-mentioned proposal.

In this context, the CPT also wishes to stress the need for continued professional training for prison health-care staff, with a view to enabling them to perform their duties satisfactorily. The Committee would like to be informed of the national policy in this respect.

124. The reports on previous visits by the CPT to Ukraine contain a number of recommendations, comments and requests for information in the area of provision of health care to prisoners. Despite efforts made by the Ukrainian authorities in recent years and the goodwill and commitment of health-care staff at the penitentiary establishments visited, the provision of health care to inmates remains problematic, due to the shortage of staff, facilities and resources. During the visit, the delegation heard a number of complaints from prisoners at the establishments visited concerning delays in access to a doctor, lack of medication, and the inadequate quality of care."

185. The relevant extracts from the Report to the Ukrainian Government on the visit to Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 29 November to 6 December 2011 [CPT/Inf (2012) 30] read as follows:

"... 48. On the occasion of this visit and in the light of reports recently received by the CPT, the delegation also examined in detail the health care being provided to certain persons who were being held at the Kyiv SIZO and, in particular, Mr Valeriy IVASHENKO, Mr Yuriy LUTSENKO and Ms Yulia TYMOSHENKO.

In this connection, the CPT would like to stress that the role of medical members of a visiting delegation is not that of a treating doctor; their task is to assess the quality of health care and, more specifically, the access to medical treatment of detained persons. The Committee also wishes to recall that the prison authorities are responsible for the health care of all prisoners; all efforts possible must be made to ensure that a precise diagnosis is promptly established and that adequate treatment required by the state of health of the person concerned is provided to all prisoners.

The CPT must express its concern that in respect of each of the three above-mentioned persons, considerable delays occurred – for various reasons – in arranging

specialised medical examinations outside the SIZO. Problems of this kind have repeatedly been observed by the CPT during all previous visits to the Kyiv SIZO as well as to other penitentiary establishments in Ukraine. The Committee urges the Ukrainian authorities to take all the necessary measures to ensure that in future, all prisoners who are in need of specialist treatment/examinations are transferred to an outside hospital without undue delay."

186. The relevant extracts from the Government's response to the above CPT Report [CPT/Inf (2012) 31] read as follows:

"Regarding paragraph 48

Ukraine and the Ministry of Healthcare of Ukraine of 10.02.2012 No. 239/5/104 all persons put under custody enjoy the possibility to receive specialized medical assistance in healthcare institutions of the Ministry of Healthcare of Ukraine without delays.

Regarding paragraph 49

In respect of the convict Ms. Julia Tymoshenko

During the time Ms. Julia Tymoshenko spent in Kachanivska penal colony (No. 54) until May 9, 2012, inclusively, 21 medical boards were set up comprising over 20 academicians, PhDs of medical sciences and Associates of Sciences; she refused to undergo medical examinations in 13 cases.

In addition, pursuant to the Joint Order of the SPS of Ukraine, the Ministry of Healthcare of Ukraine and the Ministry of External Affairs of Ukraine of 10.02.2012 No. 69/105/40 'On establishment of Medical Board Comprising Foreign Specialists for Medical Examination of Ms. Julia Tymoshenko and Support of Operation of this Board on the Territory of Ukraine' the international medical board comprising foreign specialists was established, which performed medical examinations of convict Julia Tymoshenko on February 14 and 15, 2012, and gave relevant recommendations.

It must also be noted that medical workers of Kachanivska penal colony (No. 54) proposed on a daily basis convict Julia Tymoshenko to undergo medical examinations, which were turned down by her in most cases. Out of 284 proposed medical examinations, 247 were turned down.

All board medical examinations with respect to convict Julia Tymoshenko were performed exclusively based on her written consent. Medical examinations of convict Julia Tymoshenko performed by medical personnel of Kachanivska penal colony (No. 54) were compliant with legal regulatory acts regulating procedures for provision of medical assistance to detained and convict persons.

On April 20, 2012 the board of Ministry of Healthcare and SPS specialists proposed Ms. Julia Tymoshenko to continue her treatment in the facilities of Central Clinical Hospital of UKRZALIZNYTSIA general health institution, in which, according to the opinion of German specialists, most favourable conditions were created for rehabilitation of Ms. Julia Tymoshenko.

Upon her arrival to the hospital on April [21], 2012 convict Julia Tymoshenko refused to undergo initial medical screening and examination and to start the course of rehabilitation measures.

On [sic] April, 2012 in view of implicit refusal of convict Julia Tymoshenko to sign informed consent for initial medical screening and medical intervention, she was

signed out from the hospital and transferred back to Kachanivska penal colony (No. 54).

On May 4, 2012 after the course of rehabilitation measures was suggested to Ms. Julia Tymoshenko by German and Ukrainian doctors, she agreed in the oral form to undergo this course in the facilities of Central Clinical Hospital of UKRZALIZNYTSIA general health institution under supervision of specialists from German Clinic '[S]harite'.

On May 9, 2012 Mrs. Julia Tymoshenko was hospitalized in the said healthcare institution with the purpose to undergo the course of rehabilitation measures under supervision of specialists from German Clinic '[S]harite', where she stays until present. ..."

IV. OTHER RELEVANT INTERNATIONAL MATERIALS

187. The relevant extract of the Country Report on Human Rights and Practices of the US Department of State released by the Bureau of Democracy, Human Rights and Labor in respect of Ukraine reads as follows:

"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 prosecutions by the Yanukovych government. Between November 1 and December 31, prosecutors brought charges against former prime minister Yulyia 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."

188. On 9 June 2011 the European Parliament adopted a resolution on Ukraine: the cases of Yulia Tymoshenko and other members of the former Government. The resolution reads in so far as relevant as follows:

"*The European Parliament,*

... G. whereas 12 former high-ranking officials from the Tymoshenko government are in pre-trial detention, including ... 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, ...

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, ...

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 ...

3. Reminds the Ukrainian authorities that the principle of collective responsibility for the decisions of the government does not permit the prosecution of individual members of the government for decisions that were taken collegially; ... "

THE LAW

I. SCOPE OF THE CASE

189. The Court notes that, after the communication of the case to the respondent Government, the applicant raised several new complaints.

190. In particular, in her submissions received by the Court on 8 June 2012 the applicant complained of violations of Articles 5 and 6 of the Convention and of Article 4 of Protocol No. 7 arising from the criminal proceedings regarding her tenure as the head of United Energy Systems of Ukraine.

191. In the Court's view, the applicant's new complaints are not an elaboration of her original complaints to the Court on which the parties have commented. The Court considers, therefore, that it is not appropriate to take these matters up in the context of the present case (see *Piryanik v. Ukraine*, no. 75788/01, § 20, 19 April 2005).

II. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION ON ACCOUNT OF THE CONDITIONS OF DETENTION

192. The applicant first complained under Article 3 of the Convention about the conditions of her detention in Kyiv SIZO no. 13, which, according to her, had amounted to degrading treatment prohibited by this provision. In addition, she submitted that the fact that the order for her detention was unlimited in duration had caused her continuous psychological suffering.

193. Article 3 of the Convention reads as follows:

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

A. The parties' submissions

194. The Government maintained that the applicant's complaints concerning the conditions of her detention in Kyiv SIZO no. 13 and in the Kharkiv colony were manifestly ill-founded. They contended that the conditions of the applicant's detention in both cells had been in compliance with Article 3 standards.

195. The applicant argued that the conditions of her detention in two of the three cells had been unacceptable on account of poor ventilation, limited outdoor walks, lack of drinking water, the poor quality of food, and lack of heating in one cell she had been detained in. According to her, the conditions of her detention in the colony could not be regarded as adequate, in particular, because she had not been able to have a daily outdoor walk.

B. The Court's assessment

196. The Court recalls that Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see, e.g., *Labita v. Italy* [GC], no 26772/95, § 119, ECHR 2000-IV). It has also found that the distinction between "torture" and "inhuman or degrading treatment" was intended to "attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering" (see *Ireland v. the United Kingdom*, 18 January 1978, § 167, Series A no. 25). The Court refers to the further principles established in its case-law in respect of conditions of detention (see *Sarban v. Moldova*, no. 3456/05, §§ 75-77, 4 October 2005).

197. To fall within the scope of Article 3, ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, for example, *Ireland v. the United Kingdom*, cited above, § 162).

198. If a person is detained the State must ensure that the conditions are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately ensured by, among other things, providing him with the requisite medical assistance (see *Kudła v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI). When assessing conditions of detention, account has to be taken of the cumulative effects of those conditions and the duration of the detention (see *Ostrovar v. Moldova*, no. 35207/03, § 80, 13 September 2005).

199. The Court observes that despite some inconsistency in the applicant's submissions concerning the area of her cell and the frequency with which she was able to take a shower (see paragraphs 40 and 44 above), the parties agree in substance that: (i) the applicant was kept in Kyiv SIZO no. 13 for four months and twenty days together with one or two other women in a cell measuring about 16 square metres; and (ii) she was allowed

to take a shower at least twice a week (see paragraphs 40 and 44 above). The remaining facts are in dispute between the parties.

200. The Court has frequently found a violation of Article 3 of the Convention on account of a lack of personal space afforded to detainees (see *Peers v. Greece*, no. 28524/95, §§ 69 et seq., ECHR 2001-III; *Khudoyorov v. Russia*, no. 6847/02, §§ 104 et seq., ECHR 2005-X; *Labzov v. Russia*, no. 62208/00, §§ 44 et seq., 16 June 2005; *Novoselov v. Russia*, no. 66460/01, §§ 41 et seq., 2 June 2005; *Melnik v. Ukraine*, no. 72286/01, § 103, 28 March 2006; *Visloguzov v. Ukraine*, no. 32362/02, § 46, 20 May 2010; and *Iglin v. Ukraine*, no. 39908/05, § 52, 12 January 2012). It notes, however, that contrary to the above-mentioned cases, the applicant in the present case had over five square metres of personal space in cell no. 242. The Court does not have any information about the area of cell no. 300, where the applicant was moved on 25 November 2011 before she was transferred to cell no. 206 in the medical unit (see paragraph 47 above).

201. The Court observes, moreover, that instead of the size of the relevant cell, the focus of the applicant's complaint in this part of the application related to the limited access to natural light and air available in cell no. 242, the lack of the provision of hot water and other living conditions, and the lack of heating in cell no. 300. The Court accepts that the applicant could have experienced certain problems on account of the material aspects of her detention in the relevant cells. At the same time, the Court is unable to determine whether such drawbacks affected her in any significant way. Nor is there any evidence that the internal lighting or ventilation systems were deficient or that the lack of hot water supply was permanent. In addition, the Court notes that the applicant was in regular contact with her relatives, who provided her with a sufficient quantity of good quality bed linen and food and that she was also able to communicate with the outside world, including her counsel, during the entire period of her detention in SIZO no. 13. Lastly, the Court does not consider on the basis of the available material that the other material conditions referred to by the applicant were such as to amount to degrading or inhuman treatment.

202. In respect of the material conditions of detention in Kachanivska Colony, the Court observes that the applicant was detained, with a short interruption between 20 and 22 April 2012, on the premises of this penitentiary institution from 30 December 2011 to 9 May 2012 when she was transferred to the Central Clinical Hospital (see paragraphs 111 and 164 above). The period to be taken into account, therefore, is four months and seven days. The applicant was detained together with another female inmate in a cell which measured 37.1 square metres, was equipped with two PVC windows each measuring 3.5 square metres which provided natural light and aeration. The cell was also artificially lighted and ventilated mechanically (see paragraph 111 above). Moreover, there was a separate shower room of 3.5 square metres and a toilet of 4.1 square metres. Taking

also into account other conditions described in detail above (see paragraphs 113-114) the Court considers that the material conditions of the applicant's detention in the Kachanivska Colony were compatible with the Convention standards. The Court notes that the applicant could not use her right to daily walks due to her walking difficulties connected with her state of health, and that a stick, crutch or a walker would facilitate her locomotion. Whilst that during the period under consideration the applicant's situation may have been uncomfortable, it was not so harsh as to reach the threshold of severity required to bring it within the ambit of Article 3 of the Convention.

203. It follows that these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION ON ACCOUNT OF THE MEDICAL TREATMENT PROVIDED TO THE APPLICANT

204. The applicant further complained, under Articles 2 and 3 of the Convention, of a lack of appropriate medical treatment during her detention. She had refused to allow any doctors other than those she had trusted to examine her due to her suspicion of maltreatment by the prison doctors and nurses. In addition, the fact that the order for her detention had been unlimited in duration had was detained for an unlimited period of time caused her to suffer continuous psychological suffering.

205. The Court finds it appropriate to examine the applicant's complaints under Article 3 of the Convention.

A. Parties' submissions

206. The Government in their extensive observations described the details of the medical care provided to the applicant. They concluded that her treatment had been adequate and ought not to be called into question by the applicant herself or the Court. According to them, the doctors from the SIZO medical unit had made genuine efforts to ensure the applicant's well-being during her detention there.

207. With respect to the colony in Kharkiv, the Government maintained that the colony had had all the necessary equipment and medicines required to provide the applicant with adequate medical treatment. Moreover, the applicant had had access to the services of medical specialists from leading Ukrainian and foreign healthcare institutions.

208. In sum, the Government contended that the national authorities had done everything possible in order to discharge their positive obligation under Article 3 of the Convention as regards medical care for the applicant in detention. They pointed out her numerous – in their view, fully

unjustified – refusals to agree to undergo medical examinations or other procedures, for which they submitted the authorities could not be held responsible.

209. The applicant maintained that the authorities had underestimated the seriousness of her health problems and had failed to provide her with prompt and adequate medical care until German doctors had issued a report on her illness in February 2012, while the symptoms of her deteriorating health had been confirmed by a number of internationally recognised medical experts already before. According to her, the constant manipulation of the information concerning her state of health, by providing her with painkillers on condition of her cooperation with law-enforcement bodies while knowing that she was seriously ill, had shown the lack of compliance by the Government with their obligations to provide appropriate medical assistance.

B. The Court's assessment

210. According to the Court's case-law, Article 3 of the Convention imposes an obligation on States to protect the physical well-being of persons deprived of their liberty (see *Kudła*, cited above, § 94). At the same time, it cannot be construed as laying down a general obligation to release detainees on health grounds. Rather, the compatibility of a detainee's state of health with his or her continued detention, even if he or she is seriously ill, is contingent on the State's ability to provide appropriate treatment of the requisite quality in prison (see *Goginashvili v. Georgia*, no. 47729/08, § 79, 4 October 2011).

211. The "adequacy" of medical assistance remains the most difficult element to determine. On the whole, the Court retains sufficient flexibility in defining the required standard of health care, deciding it on a case-by-case basis. That standard should be "compatible with the human dignity" of a detainee, but should also take into account "the practical demands of imprisonment" (see *Aleksanyan v. Russia*, no. 46468/06, §§ 139-140, 22 December 2008). The Court has also held that Article 3 cannot be interpreted as requiring a prisoner's every wish and preference regarding medical treatment to be accommodated (see *Mathew v. the Netherlands*, no. 24919/03, 29 September 2005).

212. The mere fact that a detainee is seen by a doctor and prescribed a certain form of treatment cannot automatically lead to the conclusion that the medical assistance was adequate (see *Hummatov v. Azerbaijan*, nos. 9852/03 and 13413/04, § 116, 29 November 2007). The authorities must also ensure that a comprehensive record is kept concerning the detainee's state of health and his or her treatment while in detention (see, e.g., *Khudobin v. Russia*, no. 59696/00, § 83, ECHR 2006-XII (extracts)), that diagnosis and care are prompt and accurate (see *Hummatov*, cited

above, § 115, and *Melnik,* cited above, §§ 104-106), and that where necessitated by the nature of a medical condition, supervision is regular and systematic and involves a comprehensive therapeutic strategy aimed at curing the detainee's diseases or preventing their aggravation, rather than addressing them on a symptomatic basis (see *Hummatov*, cited above, §§ 109 and 114; *Sarban*, cited above, § 79; and *Popov v. Russia*, no. 26853/04, § 211, 13 July 2006). The authorities must also show that the necessary conditions were created for the prescribed treatment to be actually followed through (see *Hummatov,* cited above, § 116, and *Holomiov v. Moldova*, no. 30649/05, § 117, 7 November 2006).

213. The Court has also held that the State may not be held responsible for delays caused by the applicant's own refusals to undergo medical examinations or accept treatment, where the materials available to the Court show that qualified medical assistance was made available to the applicant but that he or she voluntarily refused it (see *Knyazev v. Russia*, no. 25948/05, § 103, 8 November 2007).

214. Turning to the present case, the Court notes that it transpires from the voluminous case-file materials and submissions by the parties that the applicant's health received considerable attention from the domestic authorities, which invested resources and efforts far beyond the normal health-care arrangements available for any ordinary detainee in Ukraine. The applicant was examined by the doctors from the SIZO medical unit but refused to undergo a detailed medical examination. On 6 August 2011 she refused to be seen by a generalist, a psychiatrist, and a dentist, to have her blood pressure checked, and to undergo an electrocardiogram, fluorography examination, and blood and urine tests. She maintained her refusal on 12 August 2011 (see paragraph 59 above). She had consultations with medical professionals or received treatment every day until 30 August 2011 (see paragraphs 59-69 above). On a number of occasions she was seen by doctors when Dr. P., whom she said she trusted, was present (see paragraphs 67, 79 and 104 above). Nevertheless, she refused to allow examinations and laboratory tests by two laboratories outside the SIZO and insisted on a confidential examination by doctors of her choice and on a laboratory examination without the medical panel being informed of the results (see paragraphs 61-62 and 70 above). On 27 and 30 August and 3 September 2011 the applicant was advised to undergo an examination by the medical panel in the presence of Dr P., whom she trusted (see paragraphs 69-70 and 72 above), but she refused to do so. Moreover, the head of the SIZO medical unit examined her on a frequent basis, either finding no serious changes in her state of health or considering it satisfactory (see paragraphs 61, 64-65, 68, 71, 74-75 and 81 above). The Court notes that while the applicant refused to be seen by the medical panel in the presence of Dr P., she required to be examined by the latter during a

number of visits by the head of the SIZO medical unit (see paragraphs 62-63 above).

215. Having regard to the development of the applicant's medical treatment during the period from August to December 2011, the Court cannot accept the applicant's argument that it was not until after the involvement of the foreign doctors that she was afforded specialised treatment. It notes in this respect the findings of the CPT, which visited SIZO no. 13 between 29 November and 6 December 2011 and examined in detail the health care provided to the applicant and two other detainees, former members of the applicant's Government. While it again expressed its previously stated concerns regarding the arrangement of specialised medical examinations outside SIZOs in respect of these three persons and considerable delays in arranging specialised medical examinations outside the SIZO, the CPT did not raise any particular concern in respect of the inappropriateness of the medical treatment provided to the applicant as such (see paragraph 185 above).

216. The Court is mindful that patient trust is a key element of the doctor-patient relationship. It is particularly important and yet, at the same time, often difficult to create in pre-trial detention facilities and other penal institutions. On the one hand, patients may refuse to allow a medical examination through simple anxiety. In that case, doctors should increase levels of trust by explaining their medical role and their duty of confidentiality, the purpose of the medical examination, and the fact that they are not involved in the process of detention or criminal investigation. On the other hand, as in the present case, an element of fear having a political background can play an important role.

217. In the present case, the Court notes that the applicant was extremely cautious and refused, on a regular basis, to allow most of the medical procedures that were suggested to her. She explained this by reference to her particular political status and inherent lack of confidence in the authorities. She referred in this connection to the allegedly unfortunate experiences of others who had either contracted a disease or had died in detention. In this respect, the Court reiterates its previous finding that patients, such as the applicant, have the responsibility to communicate and cooperate with health authorities. The crucial issue here is whether such an attitude on her part could be regarded as justified and whether the State still did everything that could have been reasonably expected from them to ensure the applicant's well-being. The Court underlines in this connection that it is noteworthy that there is no specific incident noted in the applicant's medical history while in detention in Kyiv SIZO no. 13 or Kachanivska Colony in Kharkiv which could have explained such a total lack of confidence in the authorities.

218. The Court attributes particular weight to the fact that the prison administration – despite the protracted length of time taken to comply with

the interim measure ordered by the Court on 15 March 2012 and certain steps undertaken by the national authorities which did not show their willingness to meet the terms of the measure (see paragraphs 122-123 and 131 above) – transferred the applicant to the Central Clinical Hospital on 20 April 2012 (see paragraph 133 above) and then again on 9 May 2012 in order for her to undergo appropriate medical treatment under the supervision of the German neurologist from the Charité Hospital in Berlin (see paragraph 164 above). The applicant was seen by specialists, her complaints were heard and she was subjected to appropriate specialised medical procedures.

219. To sum up, the Court considers that the Government provided sufficient evidence to enable it to conclude that the domestic authorities afforded the applicant comprehensive, effective and transparent medical assistance. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 § 3 (a) and 4 of the Convention.

IV. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION ON ACCOUNT OF THE ILL-TREATMENT OF THE APPLICANT DURING HER TRANSFER TO THE CENTRAL CLINICAL HOSPITAL ON 20 APRIL 2012

220. The applicant complained that she had been transferred to the Central Clinical Hospital against her will and that she had sustained injuries during the transfer. She also alleged that the incident had not been properly investigated.

221. The Government contested that argument.

A. Admissibility

222. The Government submitted that the applicant could not be regarded as having exhausted domestic remedies in respect of her complaint of ill-treatment during her transfer to the hospital on 20 April 2012. They pointed out that she had failed to challenge the prosecutor's decision of 3 May 2012 refusing to open a criminal case regarding the aforementioned complaint.

223. The Court recalls that it dealt with a similar objection in the case of *Kaverzin v. Ukraine*, (no. 23893/03, 15 May 2012), and concluded that the remedy indicated by the Government had not been shown to be capable of providing adequate redress in respect of complaints of ill-treatment by the police and ineffective investigations (ibid., §§ 93-98). The Court does not find any reason to hold otherwise in the present case and notes that the applicant was not obliged to use the appeal procedure in question.

224. Accordingly, the Government's objection must be dismissed. The Court also finds that this complaint is not manifestly ill-founded within the

meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

225. The Government contended that the applicant's complaint of ill-treatment during her transfer from the colony to the hospital was unsubstantiated, as there was no evidence that the bruises on the applicant's body had been the consequence of the force used on her by the prison guards or that the State authorities had otherwise been responsible for the injuries sustained by the applicant.

226. As to the investigation of the ill-treatment allegation, the Government submitted that the domestic authorities had taken all reasonable efforts to establish the truth. Their conclusion that the applicant's complaint was unsubstantiated had not undermined the effectiveness of the investigation. The Government referred, *inter alia*, to the statements of members of staff who had been present in the colony on the relevant day and at the material time. In particular, three guards from the colony's surveillance and security department had confirmed that department no. 1 of the colony, where the applicant's cell had been situated, had been equipped with video cameras working in real-time mode but without a recording function. During surveillance of the applicant's cell through the monitor on 20 April 2012, one of the guards had not seen the members of the colony's staff who had visited the applicant to use physical violence against her, and he had not heard any noises either. Once the staff members had left the cell, the guard had seen on the screen that the applicant had taken a shower, had gathered her belongings together and had got into bed. In the course of their surveillance, the guards had not noticed that the applicant had sustained any bodily injuries.

227. The applicant maintains her original allegations.

2. General principles

(a) Alleged ill-treatment

228. The Court has stated on many occasions that Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman and degrading treatment or punishment, irrespective of the victim's conduct (see, among many other authorities, *Labita*, cited above, § 119, and *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V).

229. The Court further reiterates that allegations of ill-treatment must be supported by appropriate evidence. To assess this evidence, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Labita*, cited above, § 121).

230. Where an individual claims to have been injured as a result of ill-treatment in custody, the Government are under an obligation to provide a complete and sufficient explanation as to how the injuries were caused (see *Ribitsch v. Austria*, 4 December 1995, § 34, Series A no. 336).

231. In relation to detainees, the Court has emphasised that persons in custody are in a vulnerable position and that the authorities are under a duty to protect their physical well-being (see *Tarariyeva v. Russia*, no. 4353/03, § 73, ECHR 2006-XV (extracts); *Sarban*, cited above, § 77, 4 October 2005; and *Mouisel v. France*, no. 67263/01, § 40, ECHR 2002-IX). In respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention (see *Sheydayev v. Russia*, no. 65859/01, § 59, 7 December 2006, and *Ribitsch*, cited above, § 38). The burden of proof rests on the Government to demonstrate with convincing arguments that the use of force which resulted in the applicant's injuries was not excessive (see, e.g., *Dzwonkowski v. Poland*, no. 46702/99, § 51, 12 April 2007).

(b) Adequacy of the investigation

232. The Court reiterates that where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. This investigation should be capable of leading to the identification and punishment of those responsible (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 102, *Reports* 1998-VIII).

233. An obligation to investigate "is not an obligation of result, but of means": not every investigation should necessarily be successful or come to a conclusion which coincides with the claimant's account of events; however, it should in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible (see *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 71, ECHR 2002-II; and *Mahmut Kaya v. Turkey*, no. 22535/93, § 124, ECHR 2000-III).

234. An investigation into serious allegations of ill-treatment must be thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis for their decisions (see *Assenov and Others*, cited above, §§ 103 et seq.). They must take all reasonable steps available to them to secure evidence concerning the incident, including, *inter alia*, eyewitness statements and forensic evidence (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, §§ 104 et seq., ECHR 1999-IV; and *Gül v. Turkey*, no. 22676/93, § 89, 14 December 2000). Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard.

3. Application of the principles to the present case

235. The Court notes that it is established that several bruises appeared on the applicant's body during her detention in the colony. This alone calls for an explanation by the State authorities as to their origin. It recalls in this respect that a failure to provide a plausible explanation for the injuries would run counter to the State's duty to account for the well-being of a detainee under its full control.

236. It observes that on 23 April 2012 the applicant filed a complaint with the Kharkiv Regional Prosecutor's Office complaining of her forced transfer to the hospital and of ill-treatment during the course of the transfer on 20 April 2012 (see paragraph 137 above). She was first examined on 24 April 2012, when she showed her bruises to the colony medical officers (see paragraph 140 above). According to the examination report, minor bodily injuries in the form of bruises were found to have resulted from a compressive blow by or contact with a blunt object one or two days prior to the applicant's examination. The report established that the apparent age of the bruises did not, however, coincide with the time of the ill-treatment indicated by the applicant. The Court further observes that on the same date a forensic medical expert was invited to examine the applicant but that she refused to allow such an examination (see paragraph 141 above).

237. Later on the same day the head of the investigative department of the Kharkiv Regional Prosecutor's Office, having closed the one day investigation of the event, refused to institute criminal proceedings against colony staff in the absence of evidence that they had caused her bodily injuries (see paragraph 142 above). Following the quashing of that decision on 25 April 2012, further investigation was ordered (see paragraph 143 above). According to the Government, evidence was collected by the investigator from the members of colony staff involved, the medical workers and the ambulance driver who had been on duty on 20 April 2012, members of the medical panel, hospital employees and other individuals who had witnessed the transfer of the applicant to the hospital and who

stated that the applicant had not complained of the infliction of any injuries on her and that they had seen no signs of injuries on her (see paragraphs 150-161 above).

238. The Government further relied on the fact that the video surveillance of the applicant on 20 April 2012 had revealed nothing out of the ordinary. However, the Court notes that according to the Government's submissions the video surveillance, at least on 20 April 2012, operated without any recording of the images being made (see paragraph 154 above), with the consequence that the Court is not able to verify the accuracy of the Government's assertion.

239. The Court further notes that, as part of the investigation, on 26 April 2012 the applicant was once again invited to undergo a forensic medical examination to establish the origin and age of the bruising, but refused to do so. As a result of the refusal, the head of Kharkiv Medical Academy's department of forensic medicine was assigned to evaluate the applicant's injuries solely on the basis of the medical report of 24 April 2012. It was his conclusion that the state of the haematomas and their appearance one or two days before the applicant's examination were such that the injuries could not have been inflicted on 20 April 2012. In addition, having familiarised himself with the applicant's medical file, he noted that recurrent haematomas had appeared from time to time on the applicant's body since 16 August 2011 which had not resulted from external blows and could have resulted from a condition linked to the applicant's vascular and circulatory systems (see paragraph 146 above). On 3 May 2012 the investigator once again refused to institute criminal proceedings (see paragraph 149 above).

240. The Court adds that the location of the applicant's bruises would appear consistent with the applicant's account that she was violently pulled from her bed and punched in the stomach on 20 April 2012. Nevertheless, the Court cannot ignore the medical evidence before it that the apparent age of the bruising found upon examination of the applicant did not correspond with the time she indicated and that there were other possible origins of the bruising which did not involve external trauma. These findings could only have been satisfactorily confirmed or refuted if the applicant had undergone a full forensic medical examination, which the applicant refused to allow on two occasions. In the absence of such forensic evidence resulting from the applicant's decision not to undergo the examination, the Court cannot find it established to the necessary standard of proof that the bruising resulted from her treatment on being transferred to hospital on 20 April 2012 in breach of Article 3 of the Convention.

241. Since the applicant made an arguable complaint of ill-treatment before the domestic authorities, a procedural obligation under Article 3 of the Convention arose to carry out an effective investigation of the facts alleged. However, as the Court has stated above, the effectiveness of the

investigation was hindered by the applicant's failure to cooperate with the authorities through her persistent refusals to undergo a forensic medical examination, which could have confirmed or rebutted the findings as to the date and cause of the bruising sustained by her.

242. The foregoing considerations are sufficient to enable the Court to conclude that the investigation into the applicant's complaint of ill-treatment during her transfer to the Central Clinical Hospital was "effective". There has therefore been no violation of Article 3 of the Convention under its procedural limb.

V. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

243. The applicant alleged that she had been under round-the-clock surveillance in the hospital and that the prison authorities had published a full report of her medical history in the Ukrainian media. She relied on Article 8 of the Convention, which provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

244. The Government claimed that the applicant should have challenged the refusal of 1 June 2012 by the Kharkiv Regional Prosecutor's Office to take measures in respect of her allegations about her permanent surveillance in hospital and about the publication of her medical report before a higher-ranking prosecutor or a competent court. She could also have challenged the same acts directly before the administrative courts.

245. The Court reiterates that the purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions. Consequently, States are dispensed from answering for their acts before an international body before they have had an opportunity to put matters right through their own legal system. That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. Thus a complaint intended to be made subsequently to the Court must first have been made – at least in substance – to the appropriate domestic body, and in compliance with the formal

requirements and time-limits laid down in domestic law (see *Selmouni*, cited above, § 74).

246. First, the Court has already noted in respect of the applicant's complaint under Article 3 of the Convention that the judicial remedy against the prosecutor's decision is not effective within the meaning of Article 35 § 3 of the Convention (see paragraph 223 above) and considers that the same conclusion is applicable in respect of the present claim raised under Article 8 of the Convention. Secondly, the Court considers that the Code of Administrative Justice, which entered into force on 1 September 2005, the domestic courts thus having had the opportunity to develop its interpretation for over seven years, may be considered as providing a prima facie effective remedy for the kind of allegations that were made by the applicant. There are no detailed procedures envisaged for raising this particular type of complaint before the domestic courts and the Government failed to quote any examples of judicial practice. However, the question fell within the scope of paragraph 1 of Article 17 of the Code of Administrative Justice (see paragraph 181 above) which defines the jurisdiction of the administrative courts, and there is no suggestion that the dispute in the present case was excluded by paragraph 2 of that provision.

247. The Court notes that the applicant in the present case used the path offered to her by the Code of Administrative Justice. It is true that she was not successful as the Kyiv Administrative District Court dismissed her administrative action (see paragraphs 173-174 above). The Court notes, however, that the first instance judgment is open to appeal and, eventually, to appeal on points of law. The Court further notes that the applicant did not apply for an interim measure as provided for in Article 117 of the Code of Administrative Justice (see paragraph 181 above).

248. Accordingly, the applicant's complaints under Article 8 of the Convention must be rejected for non-exhaustion of domestic remedies, in accordance with Article 35 §§ 1 and 4 of the Convention.

VI. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

249. Relying on Article 5 § 1 (b) of the Convention, the applicant complained that her pre-trial detention had been unlawful and arbitrary. She also complained under Article 5 § 3 that there were no reasons for her continued detention. The applicant further complained under Article 5 § 4 that she had not been able to effectively challenge the lawfulness of her pre-trial detention. Lastly, she complained that she had not had an effective and enforceable right to compensation for her detention in contravention of the aforementioned provisions.

250. 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; ...

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.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

A. Admissibility

251. 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) The parties' submissions

252. The applicant maintained that her detention had been arbitrary and inconsistent with the purposes of Article 5 § 1 of the Convention.

253. She referred, in particular, to the Court's judgment in the case of *Kharchenko v. Ukraine* (no. 40107/02, 10 February 2011), according to which pre-trial detention for an unspecified period of time, despite being in accordance with national legislation, contradicted the Court's interpretation of Article 5 § 1.

254. The applicant further submitted that there had been no evidence that there was a risk of her absconding revealed in either the domestic proceedings or those before this Court. She pointed out that, on the contrary, she had always complied with the investigator's orders and judicial

summonses and had unfailingly appeared for all investigative activities and hearings.

255. She next argued that there had been no risk of her pursuing the illegal activities she was charged with, given that the charges against her concerned her functioning in the capacity of the Prime Minister, a role which had ceased long before the institution of the criminal proceedings in question.

256. The applicant also pointed out that the domestic courts had at no stage considered the possibility of using any less intrusive preventive measure as an alternative to her detention.

257. The Government submitted that the applicant's pre-trial detention had been ordered and subsequently extended by judicial decisions taken in accordance with national legislation. It had therefore complied with the requirements of Article 5 § 1 (c) of the Convention.

258. They expressed the view that the national court had advanced relevant and sufficient reasons justifying that preventive measure, which had been based on the specific facts of the case and the documents in the case file. They noted, in particular, that the court had referred to the risk of her absconding or hindering the investigation as the reasons for the applicant's detention. It had discerned corroboration of the existence of those risks in the applicant's refusals to inform the court about her place of residence, under the pretext that that information was in the case file. Furthermore, the court had noted that its letters previously sent to the applicant's address as indicated by her had been returned to it by the post office. In addition, in the course of the court hearing on 5 August 2011 the applicant had refused to give a signed statement indicating that she had been informed of the date, time and venue of the following court hearing. Lastly, she had been late for the hearing on 5 August 2011 without any valid reason.

259. The Government next pointed out that the applicant had been suspected of a serious crime and had failed to show respect for the court and the trial participants by ignoring the instructions of the presiding judge and obstructing the questioning of witnesses.

260. The Government also emphasised that, before ordering the applicant's detention, the court had duly examined her and her lawyer's arguments against that preventive measure.

261. They also noted that the overall period of her pre-trial detention had been relatively short.

(b) The Court's assessment

(i) General principles

262. The Court emphasises that Article 5 of the Convention enshrines a fundamental human right, namely, the protection of the individual against

arbitrary interference by the State with his or her right to liberty (see *Aksoy v. Turkey*, 18 December 1996, § 76, *Reports* 1996-VI). The list of exceptions to this right secured in Article 5 § 1 is an exhaustive one and only their narrow interpretation is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty (see Labita, cited above, § 170).

263. In assessing the lawfulness of any deprivation of liberty, the Court is not confined to the declared, ostensible purposes of the arrest or detention in question, but also looks at the real intent and purposes behind it (see *Bozano v. France*, 18 December 1986, § 60, Series A no. 111, and *Khodorkovskiy v. Russia*, no. 5829/04, § 142, 31 May 2011).

264. The Court has also held in its case-law that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to avoid all risk of arbitrariness and to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail (see, among other authorities, *Medvedyev and Others v. France* [GC], no. 3394/03, § 80, ECHR 2010, with further references).

265. Furthermore, in order for deprivation of liberty to be considered free from arbitrariness within the meaning of Article 5 § 1 of the Convention, it does not suffice that the measure be executed in conformity with national law meeting the aforementioned standards; it must also be necessary in the circumstances (see *Nešťák v. Slovakia*, no. 65559/01, § 74, 27 February 2007, and *Khayredinov v. Ukraine*, no. 38717/04, §§ 27-28, 14 October 2010).

266. Lastly, the Court emphasises that justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities (see *Belchev v. Bulgaria*, no. 39270/98, § 82, 8 April 2004, and *Castravet v. Moldova*, no. 23393/05, § 33, 13 March 2007).

(ii) Application of the principles to the present case

267. The Court notes that the applicant's detention was ordered for an indefinite period of time, which in itself runs contrary to the lawfulness requirement enshrined in Article 5 of the Convention (see, e.g., *Yeloyev v. Ukraine*, no. 17283/02, §§ 52-55, 6 November 2008; *Solovey and Zozulya v. Ukraine*, nos. 40774/02 and 4048/03, § 59, 27 November 2008; and *Doronin v. Ukraine*, no. 16505/02, § 59, 19 February 2009). Moreover, the Court has concluded that this has been a recurrent issue in the case-law against Ukraine stemming from legislative lacunae (see *Kharchenko*, cited above, § 98).

268. The Court considers that the present case discloses a number of other serious issues as regards the lawfulness of the applicant's pre-trial detention which merit further examination.

269. It observes that the detention order of 5 August 2011 did not refer to any breaches by the applicant of the obligation not to leave town which had been applied to her as a preventive measure for the four preceding months. While noting that she had refused to sign the notices informing her of scheduled hearings, the judge did not assert that she had been absent from any of those hearings. The same holds true regarding the supposed failure of the post office to deliver some of the court's letters to her: it was not contended that this had prevented her from complying with her procedural obligations. Neither did the applicant's refusal to announce her address at the hearing appear to have had any negative impact on her participation in the proceedings as required, given that her address was already in the case file. As to her being a few minutes late for the hearing on 5 August 2011, there were no reasons to regard this as a lack of cooperation on her part. Accordingly, no risk of the applicant's absconding is discernable from the accusations against her which were advanced among the reasons for her detention.

270. As transpires from the detention order, as well as the prosecutor's application for this measure and its factual context, the main justification for the applicant's detention was her supposed hindering of the proceedings and contemptuous behaviour. This reason is not included in those which would justify deprivation of liberty under Article 5 § 1 (c) of the Convention. Moreover, it remains unclear for the Court how the replacement of the applicant's obligation not to leave town by her detention was a more appropriate preventive measure in the circumstances.

271. Given that the reasons for, and therefore the purpose of, the applicant's pre-trial detention remained the same until her conviction, the Court considers that its entire period was arbitrary and unlawful.

272. It follows that there has been a violation of Article 5 § 1 of the Convention in this respect.

2. Article 5 § 4 of the Convention

(a) The parties' submissions

273. The applicant contended that she had not had a legal remedy with which to challenge the detention order of 5 August 2011. Moreover, all her requests for release had been dismissed in a formalistic manner, without any regard to her arguments.

274. The Government contended that even though the detention order of 5 August 2011 had indeed not been amenable to appeal, the initial judicial review of the lawfulness of her detention had already been incorporated in that decision.

275. They further submitted that the lawfulness of the applicant's pre-trial detention had been repeatedly reviewed by the competent court on the basis of her and her lawyer's requests for release. The Government maintained that each of those requests, and the arguments contained therein, had been scrutinised by the court in a separate procedural decision. The Pecherskyy Court had continuously upheld the preventive measure applied to the applicant on account of the persistence of the reasons mentioned in its initial detention order of 5 August 2011. In particular, the court had noted that there were no reasons for the change of preventive measure sought. The Government emphasised in this connection that the justification of the whole period of the applicant's detention by the same reasons could not be regarded as contravening her rights under Article 5 of the Convention.

(b) The Court's assessment

276. 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*, cited above, § 70).

277. The Court has held that a further function of a reasoned decision is to demonstrate to the parties that they have been heard. While Article 5 of the Convention does not impose an obligation on a judge reviewing a person's detention to address every argument contained in the appellant's submissions, its guarantees would be deprived of their substance if the judge, relying on domestic law and practice, could treat as irrelevant, or disregard, concrete facts relied upon by the detainee which would be capable of casting doubt on the "lawfulness" of the deprivation of liberty (see *Ignatenco v. Moldova*, no. 36988/07, §§ 77-78, 8 February 2011, with further references).

278. The Court notes that in the present case the lawfulness of the applicant's detention was reviewed by the domestic courts on several occasions. However, the relevant court decisions do not satisfy the requirements of Article 5 § 4, being confined in their reasoning to mere statement that no appeal lay against a ruling on change of a preventive measure delivered during the judicial examination of a case, reiterating the initially applied – and, as noted above, deficient - reasoning (see paragraphs 31-32 and 35-36 above).

279. The Court observes that in her numerous applications for release the applicant advanced specific and pertinent arguments in favour of her release, such as her unfailing compliance with the obligation not to leave

town before her remand in custody and the fact that she had made no attempt to abscond or obstruct the investigation. Furthermore, many respected public figures submitted letters of personal guarantee seeking her release. In addition, a proposal of bail was made. However, the court dismissed all those requests without any indication of consideration having been given to any of these arguments, apparently treating them as irrelevant to the question of the lawfulness of the applicant's pre-trial detention (see paragraphs 34-35 above).

280. The Court therefore concludes that the scope and nature of the judicial review afforded to the applicant by the Pecherskyy Court did not satisfy the requirements of Article 5 § 4 of the Convention.

281. The Court has already found that on the whole the domestic law does not provide for the procedure of review of the lawfulness of continued detention after the completion of pre-trial investigations satisfying the requirements of Article 5 § 4 of the Convention (see *Molodorych v. Ukraine*, no. 2161/02, § 297).

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

3. Article 5 § 5 of the Convention

(a) The parties' submissions

283. The applicant contended that she had not had an enforceable right to compensation in respect of the alleged breaches of Article 5.

284. The Government submitted that the applicant would have the right to redress in respect of her detention if it were found to be unlawful by the domestic courts.

(b) The Court's assessment

285. The Court notes that the right to compensation under Article 5 § 5 of the Convention arises only if a breach of one of its other four paragraphs – Article 5 §§ 1 (a) and 4 of the Convention in the present case – has been established, directly or in substance, by the Court or by the domestic courts (see, for example, *Svetoslav Dimitrov v. Bulgaria*, no. 55861/00, § 76, 7 February 2008, and *Çağdaş Şahin v. Turkey*, no. 28137/02, § 34, 11 April 2006). In this connection, the effective enjoyment of the right to compensation guaranteed by Article 5 § 5 must be ensured with a sufficient degree of certainty (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 182, 17 January 2012, with further references).

286. The Court notes that the issue of compensation for unlawful detention in Ukraine is regulated by the State Compensation Act (see paragraph 182 above). The right to compensation arises, in particular, where the unlawfulness of the detention has been established by a judicial decision. There is no procedure in Ukrainian law for bringing proceedings

to seek compensation for a deprivation of liberty found to be in breach of one of the other paragraphs of Article 5 by this Court.

287. The Court has already noted this lacuna in its case-law in other cases against Ukraine (see, e.g., *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, § 233, 21 April 2011). It remains pertinent in the present case.

288. It follows that there has been a violation of Article 5 § 5 of the Convention.

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

289. The applicant complained that her detention had had ulterior motives. She complained, in particular, that her detention had been used by the authorities to exclude her from political life and to prevent her standing in the parliamentary elections of 28 October 2012. She relied on Article 18 of the Convention taken in conjunction with Article 5, which provides as follows:

> "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. Admissibility

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

B. Merits

1. The parties' submissions

291. The applicant emphasised that she was the strongest opposition leader. She maintained that the real purpose of her detention had been to preclude her from standing in the parliamentary elections in Ukraine held on 28 October 2012 and to remove her from the political arena altogether. She referred in this connection to numerous reports of domestic and international observers concerning the prosecution of members of the opposition by those in power in Ukraine. The applicant further noted a number of other criminal cases which had been instituted against her, allegedly without reason. Lastly, in the context of her other complaints and submissions before the Court, she expressed doubt as to the competence and good faith of Judge K., who had been dealing with her case in the first-

instance court and who had ordered her detention as a preventive measure pending trial. According to her, by having resorted to this measure, Judge K. had punished her for nothing more than her lack of respect towards him, whereas she did not consider that any such respect had been due.

292. The Government noted that the applicant had occupied the post of Prime Minister of Ukraine for a long period of time and that she remained the leader of an opposition party enjoying widespread support among the population. Therefore, her activities, as well as any events with her involvement, had always attracted attention and had been the focus of discussions, both in the media and in Ukrainian and foreign official circles. Nonetheless, the Government emphasised the political character of those discussions, which were to be distinguished from judicial proceedings. They referred in this connection to the court's finding in the case of *Khodorkovskiy* (cited above, § 259) that the "political process and adjudicative process are fundamentally different". Accordingly, they contended that the public significance of the applicant's criminal prosecution and detention could not be regarded as proof of prejudice against her.

293. The Government also expressed the view that, apart from the applicant's reference to her intensive political activity, she had failed to provide any evidence in substantiation of her allegation that she had been deprived of her liberty for purposes other than those prescribed by Article 5 of the Convention. Lastly, the Government contended that the applicant's detention had been determined solely by her behaviour in the course of the consideration of her case by the court, that it had pursued a legitimate aim and that it had complied with the requirements laid down in Article 5 § 1 (c) of the Convention.

2. The Court's assessment

294. The Court emphasises that Article 18 of the Convention does not have an autonomous role. It can only be applied in conjunction with other Articles of the Convention (see *Gusinskiy v. Russia*, no. 70726/01, § 75, 19 May 2004). As it has previously held in its case-law, 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 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 which could 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 (see *Khodorkovskiy*, cited above, § 255).

295. When an allegation under Article 18 of the Convention is made, the Court applies a very exacting standard of proof. As a consequence, there are only a few cases where a breach of that Convention provision has been found. Thus, in *Gusinsky* (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. It based its findings on an agreement signed between the detainee and a federal Minister for the Press, from which it was clear 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. 35615/16, §§ 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. However, such cases remain rare (see, *a contrario*, *Sisojeva and Others v. Latvia* [GC], no. 60654/00, § 129, ECHR 2007-II, and *Khodorkovskiy*, cited above, § 261).

296. Turning to the present case, the Court notes the overall similarity of its circumstances to those examined in the case of *Lutsenko v. Ukraine* (no. 6492/11, § 104, 3 July 2012). Like in the cited case, soon after the change of power, the applicant, who was the former Prime Minister and the leader of the strongest opposition party, was accused of abuse of power and prosecuted. Many national and international observers, including various non-governmental organisations, media outlets, those in diplomatic circles and individual public figures, considered these events to be part of the politically motivated prosecution of opposition leaders in Ukraine.

297. As to the applicant's complaints under Article 18 of the Convention in the present case, the Court notes that they are twofold: taken in conjunction with Article 5 as regards the actual purpose of her pre-trial detention; and taken in conjunction with Article 6 as regards the fairness of the applicant's criminal prosecution and its allegedly ulterior motives2. Accordingly, the Court will confine its examination here to the applicant's complaint under Article 18 taken in conjunction with Article 5 concerning her pre-trial detention.

298. As the Court held in the case of *Lutsenko*, cited above, 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 has been ordered (§ 108). However, like in the cited case, the Court discerns a number of specific features of the applicant's pre-trial detention which allow it to look into the matter separately from the more general context of the allegedly politically motivated prosecution of the applicant as an opposition leader by instigating several criminal charges after the change of power and before the Parliamentary elections.

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[2] The scope of the second-mentioned issue is covered by application no. 65656/12.

299. The Court has already established that, although the applicant's detention was formally effected for the purposes envisaged by Article 5 § 1 (c) of the Convention, both the factual context and the reasoning advanced by the authorities (see paragraphs 269-270 above) suggest that the actual purpose of this measure was to punish the applicant for a lack of respect towards the court which it was claimed she had been manifesting by her behaviour during the proceedings.

300. In the light of these considerations and using a similar approach to the one which it has applied to the legal interpretation of the comparable circumstances in the *Lutsenko* case, the Court cannot but find that the restriction of the applicant's liberty permitted under Article 5 § 1 (c) was applied not for the purpose of bringing her before a competent legal authority on reasonable suspicion of having committed an offence, but for other reasons.

301. The Court considers this sufficient basis for finding a violation of Article 18 of the Convention taken in conjunction with Article 5.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

302. 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."

303. The applicant did not submit any claims in respect of damage or costs and expenses.

304. Accordingly, no award is made under those heads.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint under Article 3 of the Convention concerning the applicant's alleged ill-treatment during her transfer to the hospital on 20 April 2012 and its investigation, as well as the complaints under Articles 5 and 18 of the Convention, admissible and the remainder of the application inadmissible;

2. *Holds* by 4 votes to 3 that there has been no violation of Article 3 of the Convention in respect of the applicant's complaint concerning her alleged ill-treatment during her transfer to the hospital on 20 April 2012 and the effectiveness of the domestic investigation;

3. *Holds* unanimously that there has been a violation of Article 5 § 1 of the Convention;

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

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

6. *Holds* unanimously that there has been a violation of Article 18 of the Convention taken together with Article 5 of the Convention.

Done in English, and delivered at a public hearing on 30 April 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Deputy Registrar

Dean Spielmann
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Judges Jungwiert, Nußberger and Potocki;

(b) joint dissenting of Judges Spielmann, Villiger and Nußberger.

D.S.
J.S.P.

JOINT CONCURRING OPINION OF JUDGES JUNGWIERT, NUSSBERGER AND POTOCKI

We agree that there has been a violation of Article 18 read in conjunction with Article 5 of the Convention in this case. However, we consider that the reasoning of the majority does not address the applicant's main complaint, which concerns the link between human rights violations and democracy, namely that her detention has been used by the authorities to exclude her

from political life and to prevent her standing in the parliamentary elections of 28 October 2012 (see paragraph 289).

The entire philosophy of the Convention rests on the assumption that public authorities in the member States act in good faith. Any public policy or individual measure may, however, have a "hidden agenda" and serve other purposes than those officially declared. This is especially disturbing if penal law is used for purposes other than bringing to justice those who have committed a crime or a wrongful act. In such cases, finding (only) violations of those human rights guaranteed under Article 5 and Article 6 of the Convention would not be sufficient, as this would not uncover and target the real problem, namely the intentional misuse of State power.

An applicant's allegation of a violation of Article 18 of the Convention must therefore be taken very seriously. At the same time, a mere suspicion that the authorities used their powers for some other purpose than those defined in the Convention cannot be sufficient to prove that Article 18 was breached. Thus, the Court rightly applies a very exacting standard of proof (see *Khodorkovskiy,* cited above, §§ 255-256). This requirement must not, however, be such as to render it impossible for the applicant to prove a violation of Article 18. Concerning the assessment of evidence in respect of a violation of Article 18, several factors have to be taken into account.

First, the wording of Article 18 contains the word "purpose", which necessarily refers to a subjective intention which can be revealed only by the person or persons holding it, unless it is – accidentally – documented in some way (compare, for example, the case of *Gusinskiy*, cited above, §§ 73-78, in which the authorities' intention was clear from an agreement signed between the detainee and a federal Minister for Press and Mass Communications). Generally, knowledge about what the Court calls a "hidden agenda" is within the sphere of the authorities and is thus not accessible to an applicant. It is therefore necessary to accept evidence of the authorities' improper motives which relies on inferences drawn from the concrete circumstances and the context of the case. Otherwise the protection granted by Article 18 would be ineffective in practice.

Second, when relying on the circumstances and the context of a case the Court must nevertheless not apply double standards and accept more easily a violation of Article 18 in conjunction with Article 5 or 6 in the case of applicants holding specific prominent positions in society. As the Court stated in the case of *Khodorkovskiy v. Russia*, "high political status does not grant immunity" (see *Khodorkovskiy*, cited above, § 258). At the same time, in interpreting Article 18 of the Convention the direct link between human rights protection and democracy must be taken into account. If the human rights of politically active persons are restricted for the purpose of hindering or making impossible their participation in the political life of a country, democracy is in danger.

Third, Article 18 refers to the "restrictions permitted under this Convention to the said rights and freedoms". Under this explicit wording, therefore, this provision not only prohibits "misus[ing] the whole legal machinery of the respondent State *ab initio*" and "act[ing] with bad faith and in blatant disregard of the Convention from the beginning to the end" (see *Khodorkovskiy*, cited above, § 260), but also prohibits the use of specific restrictive measures such as pre-trial detention for improper purposes (see *Lutsenko*, cited above, § 109).

Fourth, it is true that the political process and adjudicative process are fundamentally different. In establishing that the authorities had improper motives in restricting a politician's human rights, the Court cannot accept as evidence the opinions and resolutions of political institutions or NGOs, or statements by other public figures (see *Khodorkovskiy*, cited above, § 259). It must base its finding of a violation of Article 18 of the Convention only on the concrete facts of the case.

Fifth, the Court has held that the burden of proof should rest with the applicant even where a prima facie case of improper motive is established (see *Khodorkovskiy*, cited above § 256). Nevertheless, that cannot mean that in cases where the authorities cannot advance any "proper motive" it would not be possible to consider an "improper motive" to be proven.

In the light of these considerations we hold that in the present case there was a violation of Article 18 not only – as the majority has held – because pre-trial detention was ordered to punish the applicant for a lack of respect towards the court (see paragraph 299), but for ulterior motives.

We take as a starting-point that the Court in the present case found that the reasons given by the trial court for the applicant's pre-trial detention were not compatible with the requirements of Article 5 § 1 of the Convention. This means that the detention of the applicant on 5 August 2011 for an unlimited period of time was arbitrary under the Convention.

The decisive question is therefore whether, despite its arbitrariness, the detention was nevertheless ordered in good faith or whether the real aim of the authorities in seeking and imposing such a measure was different from that stated and was motivated by an ulterior intention which can be proven according to the standards required by the Convention. In order to answer this question the Court has to situate the restrictions on the applicant's rights, especially the ordering of indefinite pre-trial detention on 5 August 2011, in the broader context and to take into account such factors as the point in time when it was ordered, the status of the applicant, and the way in which the authorities acted.

In this context, we consider that it is not possible to dissociate entirely this issue from the nature of the criminal proceedings brought against the applicant, although the Court's examination of the complaint under Article 18 of the Convention in the present case does not relate to the trial as

such[3]. In our view, the decision to detain the applicant must be seen in the broader context of those proceedings and of the position and status of the applicant herself at the time the proceedings were initiated. Only one year before her arrest the applicant was the main political opponent of the current President of Ukraine and obtained 45.47% of the popular vote (see paragraph 12). Even more importantly, the applicant's party had made clear its intention to participate, with the applicant as its leader, in the parliamentary elections which were to take place in October 2012 - in other words, within a time-frame that made it necessary to start preparations for the election campaign at the time of the applicant's pre-trial detention.

We further note that the charges brought against the applicant in the present case do not concern offences of corruption or fraud or offences in which it was alleged that she had sought to make personal financial gain. On the contrary, the abuse of power with which she was charged related exclusively to the circumstances of the political decision, taken by her as Prime Minister of Ukraine, to sign an international gas agreement on terms which were subsequently claimed to have been unfavourable to the country.

Moreover, it is necessary to take into account the manner in which the investigation was conducted. Although it is well-known that criminal investigations in Ukraine often last for many years, in the extremely complex case involving the applicant they were conducted with remarkable speed, namely between 11 April 2011 and 25 May 2011, that is, within less than six weeks. Of even greater significance is the fact that the investigations were conducted in such a way that the applicant was completely hindered from continuing her political activity. Thus, she was given fifteen working days to read a case file which comprised more than 4,000 pages and was called almost daily to attend the GPO's premises for questioning (see paragraph 15); after the trial started hearings were held on an almost daily basis (see paragraph 27).

It should also be noted that criminal charges were brought not only against the applicant, but also against more than eight high-level members of her Government, for abuse of office and/or misuse of State funds during their tenure. The Government's allegation that the prosecutions did not target the opposition and that there were many ongoing investigations of members of the governing party was proven not to be true as, with only a few exceptions, the latter concerned only low-level career officials (see paragraph 187). In the case of the former Minister of the Interior Lutsenko, the Court has already found violations of Articles 5 § 1, 5 § 2, 5 § 3, 5 § 4 and Article 5 in conjunction with Article 18 of the Convention (*Lutsenko v. Ukraine*, cited above); other cases are pending.

The detention order against the applicant, which was made on 5 August 2011 after 16 hearings, did not refer to any breaches by the applicant of the

[3] That issue forms part of application no. 65656/12.

obligation not to leave town, a measure with which she had fully complied. Nor was it suggested that she had been absent from any of the court hearings. The fact that the applicant had on one occasion been a few minutes late for a hearing and that she had failed to state her address, which was already in the court file, did not provide arguable grounds for finding a lack of cooperation on her part, thus justifying her indefinite pre-trial detention.

Taking into account the lack of any acceptable reason for ordering indefinite pre-trial detention and these very particular circumstances of the case, we consider it as proven on the basis of the standard required by Article 18 of the Convention that the reasons given for seeking and issuing a detention order against the applicant were not only insufficient in terms of Article 5 § 1 of the Convention but were not the only reasons, and that there were other ulterior motives underlying the action of the relevant authorities which were not related to the proper conduct of the criminal proceedings *per se*, but rather to the applicant's identity and influence as a leading opposition politician in Ukraine.

These are our reasons for concluding that there has been a violation of Article 18 of the Convention, read in conjunction with Article 5 § 1 of the Convention, in respect of the applicant's pre-trial detention.

JOINT DISSENTING OPINION OF JUDGES SPIELMANN, VILLIGER AND NUSSBERGER

We are unable to agree with the Court's finding that there has been no violation of Article 3 of the Convention on account of the ill-treatment of the applicant during her transfer to the Central Clinical Hospital of 20 April 2012.

The applicant's complaints concern both the substantive and procedural aspects of Article 3 of the Convention. As regards the former aspect, we note that it is common ground between the parties that the injuries complained of, in particular the bruises on the applicant's body, appeared after the applicant's involuntary transfer to the hospital. Thus, the applicant's complaint of ill-treatment during her transfer to the hospital, which she duly raised at the domestic level, was prima facie arguable and, given the Court's settled case-law on the matter, the authorities were required to conduct an effective official investigation.

We recall that the Court is sensitive to the subsidiary nature of its task and recognises that it must be cautious in taking on the role of a first-instance tribunal of fact where this is not rendered unavoidable by the circumstances of a particular case. Therefore, we consider it appropriate to examine first whether the applicant's complaint was adequately investigated by the authorities and subsequently to turn to the question of whether the alleged ill-treatment took place, regard being had to the relevant domestic findings.

We reiterate that Article 3 of the Convention requires that an investigation into arguable allegations of ill-treatment must be thorough. This means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions in order to close their investigation or as the basis of their decisions (see *Assenov and Others*, cited above, §§ 103 et seq.). They must take all reasonable steps available to them to obtain evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence (see *Tanrıkulu*, cited above, §§ 104 et seq., and *Gül*, cited above, § 89).

The investigation should be capable of leading to the identification and punishment of those responsible. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see *Assenov and Others*, cited above, § 102, and *Labita*, cited above, § 131).

We further recall that for an investigation into torture or ill-treatment by agents of the State to be regarded as effective, the general rule is that the persons responsible for making inquiries and those conducting the investigation should be independent hierarchically and institutionally of

anyone implicated in the events, in other words that the investigations should be independent in practice (see *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 135, ECHR 2004-IV (extracts)).

On 23 April 2012 the applicant filed a complaint with the Kharkiv Regional Prosecutor's Office complaining of her forced transfer to the hospital and of ill-treatment during the course of the transfer on 20 April 2012. She was first examined on 24 April 2012, when she showed her bruises to the colony medical officers despite the fact that she had already asked for a medical examination on the previous day. According to the examination report, minor bodily injuries in the form of bruises were found to have resulted from a compressive blow by or contact with a blunt object one or two days prior to the applicant's examination. The report established that the apparent age of the bruises did not, however, coincide with the time of the ill-treatment indicated by the applicant. Moreover, on the same date a forensic medical expert was invited to examine the applicant but she refused to allow such an examination.

Later on the same date the head of the investigative department of the Kharkiv Regional Prosecutor's Office, having closed the one-day investigation of the event, refused to institute criminal proceedings against colony staff in the absence of evidence that they had caused her bodily injuries. Following the quashing of that decision on 25 April 2012, a further investigation was ordered.

On 3 May 2012 the investigator at the prosecutor's office again refused to institute criminal proceedings against any member of the colony staff, in the absence of any indication of criminal conduct on their part. In his decision, reliance was placed on the refusal of the applicant to undergo a forensic medical examination on two occasions, on 24 and 26 April. According to the Government, evidence had been collected by the investigator from the members of colony staff involved, the medical workers and the ambulance driver who had been on duty on 20 April 2012, members of the medical panel, hospital employees and other individuals who had witnessed the transfer of the applicant to the hospital and who stated that the applicant had not complained of the infliction of any injuries on her and that they had seen no signs of injuries on her.

We note however that it does not appear from the material in the file that any explanation was sought by the investigator as to why the transfer of the applicant had been carried out in a hasty manner very late in the evening since there was nothing in the applicant's previous medical records to suggest that her health condition necessitated an urgent transfer which could not wait until the next morning. Moreover, the investigator does not appear to have questioned why the applicant's co-inmate has been removed from the cell at around 9 pm on 20 April 2012 (see paragraph 160), i.e, immediately before the prison guards came to take the applicant to the hospital. The investigator has not sought an explanation for such an unusual

event, which is all the more remarkable as thus the only neutral witness not integrated in the prison hierarchy and not linked to the authorities was removed.

Of even greater significance is the fact that, whatever the evidence of those associated with the applicant's transfer to hospital on 20 April 2012, the applicant while in custody had sustained bruising which was found both in the examination report of 24 April and the Ombudsman's report of 25 April to have resulted from the use of compressive force. This required in our view a more searching inquiry as to the cause of the injuries, going beyond merely questioning those who had been directly involved in the transfer to hospital. We do not find on the evidence before us that such a thorough examination was carried out. In particular, in the report of 24 April it was indicated that the apparent age of the bruising did not coincide with the time indicated by the applicant and that the localisation of the injuries was such that they could have been self-inflicted. However, there is nothing to suggest that the investigator took any steps to establish precisely when the injuries were likely to have been sustained in the view of the colony medical staff or of the head of the Kharkiv Medical Academy department of forensic medicine, who had confirmed that view in his report of 26 April. Nor does it appear that the suggestion that the applicant's injuries may have been self-inflicted, if such a suggestion was treated as credible, was pursued by the investigator either with the applicant herself or with the staff of the colony where, according to the authorities, she had been kept under continuous video surveillance. Further, there is no indication that the theory, first put forward in the report of 26 April 2012, that the applicant's bruising was not caused by a compressive blow, as had previously been found, but was related to a condition linked to the applicant's vascular and circulatory system, was followed up in the investigation. In particular, it does not seem that any attempt was made to examine the applicant's medical records to which reference was made in the report or to establish the likelihood that the bruising in question had no external cause.

It is true that the investigation was hampered by the applicant's refusal to undergo a forensic medical examination on two occasions, as noted in the decision of 3 May 2012. However, we cannot overlook the fact that the history of the applicant's detention was characterised by her mistrust of the State authorities, including medical staff and experts who worked under the authority of the State and were not seen by her to enjoy the necessary independence. In these circumstances, we do not find unreasonable the applicant's wish, in a case in which she alleged an assault by members of the prison administration, to be examined by an expert seen by her to be entirely independent of the State authorities. We note in this connection that under Ukrainian law individuals do not have a direct access to forensic medical examinations without an investigator's or judge's authorisation. In any event, whether or not her refusal can be regarded as reasonable, it did

not exonerate the prosecuting authorities from taking such steps as were open to them to establish the nature and cause of the recent bruising which had unquestionably occurred while the applicant was detained in custody. For the reasons given above, we do not find any evidence that the necessary steps were taken.

Given the shortcomings found, we find that the investigation was not thorough and thus fell short of the requirements of Article 3 of the Convention.

We note that the applicant complains also of the lack of an independent investigation of the matter. The investigation was entrusted to the investigator of the Kharkiv Prosecutor Regional Office. The head of the investigative department of the Kharkiv Regional Prosecutor's Office had twice refused to institute criminal proceedings against colony staff due to the absence of any indication of a criminal conduct. Having regard to our opinion that the investigation did not in any event satisfy the requirements of thoroughness in the present case, we do not consider it necessary finally to determine whether the investigation also lacked the requirement of independence. In our opinion, there has been a violation of the procedural requirements of Article 3 of the Convention.

Turning to the substantive aspect of the applicant's complaint, we observe that in the present case there is no conclusive evidence concerning the circumstances in which the applicant was injured and in particular concerning the exact nature and degree of force used against her. Nevertheless, we consider that the bruising which was established on the applicant's body was consistent with the account given by her of an assault by one or more members of the staff of the colony at the time of her transfer to hospital. Moreover, it is in any event beyond dispute that the bruising occurred while the applicant was in detention, thereby imposing on the Government the burden of advancing a plausible explanation as to how the bruising had occurred which did not involve the use of force on the applicant by members of the staff of the colony (see *Ribitsch*, cited above, § 34, and *Salman v. Turkey* [GC], no. 21986/93, §100, ECHR 2000-VII). It cannot be considered sufficient to advance hypotheses without making any effort to prove their veracity. In view of the inadequacies of the investigation into the circumstances of the bruising which are noted above, we are of the opinion that the Government have failed to advance any plausible explanation for the injuries of the applicants while in detention. Accordingly, in our opinion Article 3 of the Convention was violated also in its substantive aspect.