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The challenges of arguing Article 18 at the European Court

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Article 18 of the European Convention on Human Rights (ECHR) is not a provision often invoked by applicants, and violations under this article have only been found by the European Court of Human Rights (ECtHR) in a handful of cases. Article 18 provides that *"[the] restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."* It follows that this Article, like Article 14, is not autonomous and can only be applied in conjunction with another Article of the ECHR which permits restrictions to certain rights and freedoms.[1] The purpose of Article 18 is to prevent the misuse for ulterior motives of legal instruments allowing a restriction on human rights.

The ECtHR has established a very high evidential barrier for finding a violation under Article 18. It proceeds from the general assumption that public authorities act in good faith and it is for the applicant who alleges an improper motive to rebut this presumption by showing *"convincingly that the real aim of the authorities was not the same as that proclaimed (or as could be reasonably inferred from the context)."*[2] Even if the applicant adduces prima facie evidence of improper motives, the burden of proof does not shift to the Government and remains with the applicant.[3]

In *Gusinskiy v Russia* (No. 70276/01) 19.05.04 the ECtHR was able to find a violation under Article 18 because the Government had signed an agreement with the applicant, linking the termination of a criminal investigation against him with the sale of the applicant's media company to Gazprom. Having such direct proof, the ECtHR concluded that the applicant's prosecution was used to intimidate him and that the restriction of the applicant's liberty permitted under Article 5 § 1 (c) was applied not only for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, but also for other reasons.[4] One rare example of a case where inferences were drawn from the context in the absence of direct evidence is *Cebotari v Moldova* (No. 35615/06) 13.11.07. In this case, based on its finding that there was no reasonable suspicion that the applicant had committed an offence to justify his arrest and detention, and analysing the timing when the criminal case against the applicant was opened, the ECtHR deduced that the real aim of the criminal proceedings and of the applicant's arrest and detention was to put pressure on him to hinder his company from pursuing its application before the ECtHR in another case.[5]

In contrast, in *Khodorkovskiy v Russia* (No. 5829/04) 28.11.11, the facts surrounding the applicant's prosecution, resolutions of political institutions, statements of NGOs and various public figures, and even the decisions of several European courts were not found by the ECtHR to be sufficient to infer a violation of Article 18 in conjunction with Article 5. The ECtHR admitted that the applicant's case may raise certain suspicions as to the real intent of the authorities, which might be sufficient for the domestic courts to refuse extradition, deny legal assistance, issue injunctions against Russia, make pecuniary awards, etc. However, these were not sufficient for the ECtHR *"to conclude that the whole legal machinery of the respondent State in the present case was ab initio misused, that from the beginning to the end the authorities were acting with bad faith and in blatant disregard of the Convention. This is a very serious claim which requires an incontrovertible and direct proof."*[6] Similarly in *OAO Neftyanaya Kompaniya Yukos v Russia* (No. 14902/04) 08.03.12, the ECtHR found no indication of any issues or defects in the proceedings against the applicant's company to enable it to conclude that there had been a breach of Article 18 on account of the applicant's company's claim that the State had misused the proceedings with a view to destroying the company and taking control of its assets.[7] A similar conclusion can also be expected in the case of *Lebedev v Russia* (No. 13772/05) dec. 27.5.10 (No. 2), in which the ECtHR has agreed to examine the merits of the allegation of a violation of Article 18.[8]

In this regard, the recent ECtHR judgment in *Lutsenko v Ukraine* (No. 6492/11) 3.7.2012 merits attention. In this case, the ECtHR found a violation of Article 18 in conjunction with Article 5. The applicant – a former government member and one of the opposition leaders – complained that the proceedings against him and his arrest were used by the authorities to exclude him from political life and from participating in upcoming parliamentary elections. The ECtHR, however, did not make a finding on the allegation of political motivation behind the prosecution as a whole, but instead found that in this particular case, the applicant's arrest and detention had distinguishable features which allowed the ECtHR to consider them separately. In particular, it was noted that the applicant's detention was ordered after the investigation against him had been completed. When finding the violation, the ECtHR relied inter alia on the fact that prosecuting authorities had explicitly pointed to the applicant's communication with the media as one of the grounds for his arrest, accusing him of distorting public opinion about crimes committed by him. In the ECtHR's opinion, such reasoning by the prosecuting authorities clearly demonstrated their attempt to punish the applicant for publicly disagreeing with accusations against him and for asserting his innocence, which he had the right to do.[9] Furthermore, in this case, the ECtHR recognised the importance of inferences which can be drawn from the general factual context in a case when

determining an alleged violation under Article 18. In particular, it noted that soon after the change of power, the applicant, who was the leader of a popular political party and a former Government minister, had been accused of abuse of power and prosecuted, and that, according to external observers, the context was the politically motivated prosecution of opposition leaders.[10]

There are several pending cases where the ECtHR may look into this issue again. In the high-profile case of *Tymoshenko v Ukraine* (No. 49872/11), the former Prime Minister and leader of the opposition party, who is currently serving a prison term for abuse of office, claims that the criminal prosecution brought against her is politically motivated. In *Navalnyy and Yashin v Russia* (No. 76204/11), the applicants claim that their liberty was restricted for the purpose of undermining their rights to freedom of assembly and expression. It remains to be seen whether the ECtHR will continue to rely mainly on direct evidence when considering violations of Article 18, or whether it will allow reasonable inferences from the context as in *Cebotari v Moldova*.

1 *Kamma v the Netherlands* (No. 4771/71), 14.7.74, page 9.

2 *Khodorkovskiy v Russia* (No. 5829/04), 31.5.11, para. 255.

3 *Khodorkovskiy v Russia*, ibid, para. 256

4 *Gusinskiy v Russia* (No. 70276/01), 19.5.04, paras. 75-77.

5 *Cebotari v Moldova* (No. 35615/06), 13.11.07, paras. 51-53.

6 *Khodorkovskiy v. Russia*, ibid, para. 260.

7 *OAO Neftyanaya Kompaniya Yukos v Russia* (No. 14902/04), 20.9.2011, paras. 665-666.

8 *Lebedev v Russia* (No. 2) (No. 13772/05), dec. 27.5.2010, paras. 310-314.

9 *Lutsenko v Ukraine* (No. 6492/11), 3.7.2012, paras. 108-109.

10 Ibid, para. 104.