CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 39964/02
by Sergey and Svetlana KHAYLO
against Ukraine

The European Court of Human Rights (Second Section), sitting on 28 June 2005 as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr I. CABRAL BARRETO,
Mr V. BUTKEVYCH,
Mrs A. MULARONI,
Mrs E. FURA-SANDSTRÖM,
Ms D. JOČIENĖ,
Mr D. POPOVIĆ, *judges*,

and Mr S. NAISMITH, *Deputy Section Registrar*,

Having regard to the above application lodged on 10 August 2002,

Having deliberated, decides as follows:

THE FACTS

The applicants, Mr Sergey Khaylo and Mrs Svetlana Khaylo, are Ukrainian nationals who were born in 1954 and live in the city of Dnepropetrovsk.

The facts of the case, as submitted by the applicant, may be summarised as follows.

1. The events of 15 and 16 October 2002 and related proceedings

The applicants (husband and wife) were in a dispute with the K. family over the ownership of an apartment. On 15 October 2002 Mr K. lodged with to the Zhovtnevyy District Police Department a criminal complaint, alleging that the applicants had unlawfully broken into the apartment at issue (at that time occupied by his family) and refused to vacate it despite his numerous demands.

The same day three police constables went to the apartment and took statements from the applicants and the K. family. Following this visit Mr K.'s complaint was dismissed on the ground that the matter constituted a civil dispute and thus there was no need for any police involvement.

On 16 October 2002 Mr K. complained to the police about the applicants' allegedly unlawful and abusive conduct in the shared apartment. On the same day officers of the Special Detached Police Company (the police unite ensuring security in the courtroom; hereafter "the SDPC") apprehended the applicants.

According to the applicants, some ten men, who had pistols and wore black masks, rushed into the apartment. They attacked the applicants without any prior warning. The applicants' hands were pulled behind their back and they were handcuffed. The men in masks hit them on the head with fists and truncheons. In particular, the second applicant (Mrs Khaylo) was struck two or three times on her head and the back of her neck.

At the subsequent inquiry the police officers stated that the applicants had sworn at them, grabbed at their clothes and refused to go voluntarily to the police station. Therefore, the officers had had to use force and "special means" (truncheons and handcuffs) to carry out a forced apprehension.

The applicants state that following the apprehension they were brought to the police station where they remained for seven hours. The same day the police officers drew up an "administrative offence" report and referred it to the court for examination. On the same date (16 October 2002) the applicants stood trial for resistance to the police, for which they were acquitted and released by the court.

On 23 October 2002 the criminal proceedings against the applicants for unlawful break-in were discontinued by the Deputy Prosecutor of the Zhovtnevyy District due to the lack of any *corpus delicti*.

On 22 October 2002 applicants lodged a complaint with the General Prosecutor against the officers concerned with the events of 16 October 2002, alleging unlawful detention and ill-treatment. On 29 November 2002 the Dnepropetrovsk Regional Prosecutor's Office decided not to bring any charges against the policemen for lack of *corpus delicti* in their actions. On 3 December 2002 the Deputy Prosecutor of the Dnepropetrovsk Region quashed this decision and ordered an additional inquiry.

On an unknown date the applicants were examined by a forensic expert who established various injuries including three bruises on the frontal part

of the first applicant's forearm, three bruises on his right shin and a bruise on his index finger. The expert also found that the second applicant had sustained several injuries to her head which had led to cerebral concussion. These injuries could have resulted from the use of truncheons and handcuffs at the time and in the circumstances specified by the applicants.

On 17 December 2002 the case against the police officers was closed due to the lack of evidence to justify any criminal proceedings against them.

The applicants challenged the latter decision before the court. On 10 October 2003 the Zhovtnevyy District Court of Dnepropetrovsk quashed the investigator's decision and remitted the case for a fresh investigation finding that the original inquiry was flawed. This decision was appealed against by the Dnepropetrovsk Regional Prosecutor's Office. On 10 December 2003 the Dnepropetrovsk Regional Court of Appeal rejected the prosecution's submissions, referring to numerous gaps in the inquiry:

- the failure to give proper consideration to the forensic report on the injuries sustained by the applicants;
- the failure to examine the circumstances of the first police visit to the apartment on 15 October 2002 and to question the relevant officers;
- the failure to establish the reasonableness of the police involvement in the dispute between the applicant and the K. family;
- the failure to establish and question the person who decided to dispatch the officers from the SDPC to this particular assignment;
- the failure to question the officer G. who gave the preliminary instruction to the officers involved.

On 3 February 2004 the Dnepropetrovsk Regional Prosecutor's Office discontinued the investigation on the ground that in all the circumstances the police had not acted unlawfully.

On 24 May 2004 the Zhovtnevyy District Court of Dnepropetrovsk upheld this decision.

2. The case concerning the alleged extortion

In 1998 the first applicant and Mr B. concluded a contract. The applicant received from Mr B. USD 20,000 under the guarantee of an apartment which he had acquired from third persons. The applicant undertook to repay this money to Mr B. from the price of another apartment in his ownership which he had put up for sale and Mr B. in his turn was to contribute to selling this apartment. Both the applicant and Mr B. defaulted and failed to comply with the contract, in that the applicant failed to repay the borrowed sum in time and Mr B. failed to sell the applicant's apartment.

The applicants alleged that Mr B. had threatened them with death and bodily harm to urge them to return the borrowed sum.

In December 1999 on the applicants' complaint, criminal proceedings were instituted against B. for extortion. The pre-trial investigation in the case was completed in 2001.

The case was examined in three court instances on two occasions. On 25 December 2001, having acquitted the defendant, the trial court issued a separate ruling to the effect that the applicants had made false statements against Mr B. and forged audio tapes to prove his guilt. The court recommended to the Prosecutor of the Dnepropetrovsk Region to consider the possibility of charging the applicants with a relevant offence. However, no action was taken on this matter and Mr B.'s acquittal was subsequently quashed on appeal.

On 5 August 2003 the Samarsky District Court of Dnepropetrovsk acquitted Mr B. and dismissed the applicants' civil claim. On 12 November 2003 the Dnepropetrovsk Regional Court of Appeal upheld this decision. On 18 May 2004 the Supreme Court rejected the applicants and the prosecutor's cassation appeals.

3. The case concerning the alleged fraud

In December 1999 the applicants lodged with the Dnepropetrovsk Regional State Security Department a criminal complaint against Mr R. and Mr V. (local NGO leaders). They alleged that these persons had borrowed from them some USD 27,000 for the purchase and supply of humanitarian aid products for indigent families in the Dnepropetrovsk Region. The applicants had been allegedly deceived about this contract as they had not been aware of the fact that the supply of the humanitarian aid was fully funded by a USA company. They also stated that V. and R. had embezzled a part of the cargo.

The applicants' complaint was referred to the Zhovtnevyy District Police Department, where it was rejected on 6 May 2000 as unsubstantiated. On 10 February 2000 the Prosecutor of the Zhovtnevyy District quashed this decision. In March 2000 the Economic Crimes Unit of the Dnepropetrovsk Regional Police Department indicated to the Zhovtnevyy District Police Department that the preliminary inquiry into the applicants' complaints was flawed.

On 21 April 2000 criminal proceedings were instituted against Mr R. and Mr V. on suspicion of fraud.

The case was closed and reopened on several occasions.

On 4 May 2001 the Dnepropetrovsk Regional Prosecutor's Office and on 26 June 2002 the General Prosecutor's Office issued letters, stating that the Regional Police Department had failed to comply with the prosecutor's previous instructions, given that the irregularities of the investigation had not been rectified. The prosecutors urged the police to speed up the proceedings and to undertake a thorough and detailed investigation of the applicants' allegation.

On 26 February 2002 the Ministry of the Interior instructed the Dnepropetrovsk Regional Police Department to reassign the case to a more experienced investigator and to pursue the proceedings as expeditiously as possible in the view of serious delays caused by the current investigation team.

Subsequently the case was transferred to the Zaporozhye Regional Police Department, where on 11 February 2004 it was closed for lack of *corpus delicti*.

The applicant challenged this decision. On 27 May 2004 the Ordzhonikidzevsky District Court of Zaporozhye upheld it, finding, *inter alia*, that the matter constituted a commercial dispute rather than a criminal case and that, in any event, the loan had been repaid to the applicant partly in cash, partly by goods from the humanitarian aid.

4. The investigation into the death of the first applicant's brother

On 30 April 2002 the police found a rotting corpse in the house belonging to the applicant's brother. During the inspection of the scene no sign of a struggle was found and no broken locks or forced entry noted.

According to the pathologist's report of 2 May 2002 the examined corpse measured 177 cm. in height. The report was vague on the time of the death. The pathologist further indicated that due to the degree of decomposition of the body, he was unable to determine the cause of death; however, he suggested that the deceased had been suffering from arteriosclerosis which could have led to his death.

On 20 May 2002 the investigator from the Zhovtnevyy District Prosecutor's Office closed the case, finding no evidence that the applicant's brother had been murdered.

On 4 June 2002 the prosecutor from the Dnepropetrovsk Regional Prosecutor's Office quashed this decision and ordered a further inquiry. He instructed the police to rectify the discrepancies between the statements of the applicants, who alleged to have seen the deceased on 28 May 2002, and the report, recording a high degree of decomposition of the body. The prosecutor also indicated the need to ascertain the possibility of anyone outside entering the house without breaking locks.

The case was subsequently closed and reopened on several occasions.

On 22 October 2003 the investigator from the Zhovtnevyy District Prosecutor's Office closed the case for lack of evidence of criminal involvement in the death. This conclusion was based, *inter alia*, on the testimonies of the witnesses of the crime scene inspection; medical evidence and the deceased's anthropometric data. The investigator's final report also referred to the disciplinary inquiry carried out into the irregularities of the pathologist's report. The discrepancy between the recorded height of the body (177 cm.) and the actual height of the deceased (196 cm.) was reported

to be the result of a recording mistake. A one-day delay between the arrival of the body and the autopsy was due to the national holiday on 1 May.

On 6 April 2004 the Zhovtnevyy District Court of Dnepropetrovsk, on the applicant's request, quashed this conclusion and ordered a further investigation. The court specified the following irregularities in the investigation:

- the failure to establish with sufficient precision the origin of the striking discrepancy between the recorded height of the body and the actual height of the deceased;
- the failure to produce the photographs made during the inspection at the scene;
- failure to establish the cause of death (the applicants had provided medical documents attesting that the deceased had never suffered from arteriosclerosis);
- failure to find out whether there was a possibility to enter the house without breaking locks.

The investigation in the case is apparently still pending.

COMPLAINTS

The applicants complain under Article 3 of the Convention about the allegedly unreasonable and disproportionate use of force by the police officers during their forced apprehension on 16 October 2002. They also allege that the investigation into this incident was flawed and insufficient. The applicants also complain under Article 5 of the Convention that their detention at the police station was unlawful.

The applicants further complain about the length and outcome of the proceedings concerning the alleged extortion and fraud committed against them. They rely on Article 6 of the Convention.

The applicants finally allege that the State failed to provide an effective and independent investigation into the first applicant's brother's death. They refer in substance to Article 2 of the Convention.

THE LAW

1. The events of 15 and 16 October 2002 and related proceedings

The applicants complain about the excessive use of force by the police officers and the ineffectiveness of the investigation into the incident. They refer to Article 3 of the Convention which provides as follows:

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

The applicants further complain about the alleged unlawfulness of their detention in the police station. They rely on Article 5 § 1 of the Convention, which as far as relevant reads 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:
>
> ... (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;

The Court considers that it cannot, on the basis of the case-file, determine the admissibility of these complaints and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

2. The case concerning the alleged extortion

The applicants complain about the outcome and length of criminal proceedings against B. for extortion to which they were a civil party. They rely on Article 6 § 1 of the Convention, which as far as relevant reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

The Court notes that it cannot examine alleged errors of fact and law committed by the domestic judicial authorities, insofar as no unfairness of the proceedings can be detected and the decisions reached were not arbitrary. The Court notes that the applicants enjoyed the right to adversarial proceedings with the participation of interested parties. Within the framework of the proceedings, the applicants were able to present all necessary arguments defending their interests, and the judicial authorities considered them properly. The Court, therefore, rejects this part of the application, in accordance with Article 35 §§ 3 and 4 of the Convention, as being manifestly ill-founded.

As regards the complaint about the unreasonable length of the respective proceedings, the Court notes that criminal proceedings were instituted against B. in December 1999 and ended with the decision of the Supreme Court in May 2004. Therefore the period to be considered lasted four years and six months. This period involves the preliminary investigation of various applicants' submissions (which were subsequently found by the court to be unsubstantiated and false) and court consideration of the case on two occasions. The Court discerns no substantial period of inactivity

attributable to the State. In the circumstances, therefore, the Court concludes that the criminal proceedings were not unduly lengthy and rejects this part of the application in accordance with Article 35 §§ 3 and 4 of the Convention, as being manifestly ill-founded.

3. The case concerning the alleged fraud

The applicants complain about the length and the outcome of the criminal proceedings concerning the alleged extortion to which they were a civil party. They refer to Article 6 of the Convention, cited above.

The Court considers that it cannot, on the basis of the case-file, determine the admissibility of the complaint concerning the length of these proceedings and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

As regards the applicants' complaint about the outcome of the proceedings, the Court notes that the investigator's decision to discontinue the criminal proceedings against the alleged perpetrators was reviewed by the Ordzhonikidzevsky District Court of Zaporozhye on the applicants' application. The court found that no fault had been committed by the prosecution authorities and upheld the investigator's conclusions. It appears from the applicant's submissions that they have failed to appeal against this decision to the Zaporozhye Regional Court of Appeal as they were free to do under Article 236-6 of the Code of Criminal Procedure. It follows that this part of the application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

4. The investigation into the death of the first applicant's brother

The applicants complain about the lack of effective investigation into the circumstances of the death of the first applicant's brother. They rely in substance on Article 2 of the Convention, which as far as relevant reads as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

The Court considers that it cannot, on the basis of the case-file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicants' complaints concerning Articles 2, 3, 5 § 1 and 6 § 1 of the Convention (with respect to the length of the criminal proceedings concerning the alleged fraud);

Declares the remainder of the application inadmissible.

S. NAISMITH
Deputy Registrar

J.-P. COSTA
President