CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIFTH SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 34211/04
by Roman Grigoryevich MIROSHNICHENKO and
Mariya Danilovna GORYUNENKO
against Ukraine

The European Court of Human Rights (Fifth Section), sitting on 3 April 2007 as a Chamber composed of:

Mr P. LORENZEN, *President*,
Mrs S. BOTOUCHAROVA,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr R. MARUSTE,
Mr M. VILLIGER, *judges*,
and Mrs C. WESTERDIEK, *Section Registrar*,

Having regard to the above application lodged on 15 September 2004,

Having deliberated, decides as follows:

THE FACTS

The applicants, Mr Roman Grigoryevich Miroshnichenko (the first applicant) and Mariya Danilovna Goryunenko (the second applicant, who is the grandmother and guardian of the first applicant), are Ukrainian nationals who were born in 1980 and 1936 respectively and live in Pavlograd.

A. The circumstances of the case

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

1. Criminal proceedings brought against the first applicant

On 17 November 2000 the first applicant was arrested and placed in pre-trial detention on suspicion of robbery. The second applicant was not informed about his arrest until 15 December 2000.

Between 17 and 20 November 2000 the first applicant was questioned on several occasions by a police investigator. He admitted having been involved in the commission of the robbery for which he had been arrested.

On 20 November 2000 the first applicant was formally charged with involvement in a robbery. On the same date the Pavlograd City Prosecutor authorised the first applicant's pre-trial detention for a maximum of two months on the ground of suspicion of involvement in a serious offence.

On 13 January 2001 the investigator assigned to the case requested the City Prosecutor to extend the first applicant's pre-trial detention until 17 February 2001. The investigator stated in this context that, although the first applicant's guilt had been sufficiently proven by the evidence collected in the course of the pre-trial proceedings, it was still necessary to await the outcome of the forensic examination of the injuries sustained by the victim. The investigator not only needed more time to question several further witnesses, but also, given "the severity of the [offence] committed", it was in his opinion inappropriate to alter the preventive measure of detention applied in respect of the applicant. On the same date the City Prosecutor granted the request and extended the first applicant's detention until 17 February 2001.

On 24 January 2001 the second applicant filed a request with the City Prosecutor for the first applicant's release. By letter of 24 January 2001 the Prosecutor replied that there was no reason to vary the pre-trial measure applied to the first applicant.

On a subsequent, unspecified date the first applicant was further charged with several counts of robbery and theft committed jointly with two others.

On an unspecified date before May 2002 the first applicant was committed for trial.

On 3 July 2002 the Pavlograd City Court (hereafter "the City Court") convicted him of several counts of robbery and theft, and sentenced him to five years' imprisonment.

The first applicant appealed. The second applicant was admitted as the first applicant's representative in the appeal proceedings. On 6 December 2002 the Dnepropertovsk Regional Court of Appeal (hereafter "the Court of Appeal") quashed the judgment of 3 July 2002, finding that the conviction was not based on sufficient evidence. The Court of Appeal

ordered that further pre-trial investigations be carried out. It also decided, without giving any reasons, to extend the first applicant's detention for two months pending the additional investigations.

On 27 March 2003 the first applicant gave a handwritten letter to the investigator in which he requested to be released pending the criminal investigation and trial proceedings. This request remained unanswered.

In May 2003, having re-interviewed several witnesses, the prosecution submitted the first applicant's case to the City Court for a fresh trial.

On 6 May 2003 the City Court found at the preparatory hearing that the evidence gathered against the first applicant and his co-defendants was insufficient and that the instructions of the Court of Appeal had not been followed. The case was remitted for fresh pre-trial investigations. The court also ordered that the first applicant should remain in detention, without, however, giving any reasons for this decision. The prosecutor lodged an appeal against this decision

On 4 July 2003 the Court of Appeal quashed the decision of 6 May 2003 and referred the case to the City Court for trial. The Court of Appeal also decided, without giving any reasons, that the first applicant was to remain in detention.

On 1 April 2004 the City Court, following adversarial proceedings during which the second applicant acted as the first applicant's representative, convicted the first applicant of theft and robbery and sentenced him to five years' imprisonment with deduction of the time spent in detention on remand.

That judgment was upheld by the Court of Appeal on 9 June 2004 and by the Supreme Court on 17 March 2005.

2. Civil proceedings brought by the second applicant

In July 2002 the second applicant brought civil proceedings against the Pavlograd City Police Department claiming compensation for non-pecuniary damage suffered on account of her belated notification of the arrest and detention of the first applicant. On 5 October 2004 the City Court, having examined the merits of this claim, rejected it as unsubstantiated. The court acknowledged that the second applicant did have a right to be informed about the arrest of her grandson. However, during his initial questioning, the first applicant had not given the authorities any information about his relatives or his place of residence.

The second applicant lodged an appeal. By decisions of 1 and 30 November 2004 the City Court found that the second applicant's appeal did not comply with the formal requirements. It adjourned the appeal proceedings, inviting the second applicant to rectify the shortcomings by submitting the appeal in printed form instead of in handwriting, to identify the defendant by name, to indicate the defendant's exact address and to specify her grounds for appealing against the judgment of 5 October 2004.

As the second applicant failed to remedy these formal shortcomings, the City Court declared the appeal inadmissible on 11 January 2005.

On an unspecified date, the second applicant lodged a fresh appeal against the judgment of 5 October 2004. This appeal was declared inadmissible by the City Court on 13 January 2005 for having been filed after the expiry of the statutory time limit for filing an appeal.

B. Relevant domestic law

1. Two types of detention on remand

The Code of Criminal Procedure 1960 (hereafter "the CCP") distinguishes between two categories of preventive detention, namely detention "pending pre-trial investigation", that is, while a competent criminal investigation authority – the police or a prosecutor's office – investigates the case, and detention "pending trial", that is while the case is being tried in court. Although there is no difference in practice between them (the detainee is held in the same detention facility), the calculation of the time-limits is different.

2. Time-limits for detention "pending the investigation"

The text of Article 156 of the CCP, which sets out the time-limits for detention "pending pre-trial investigation", is stated in the judgment of *Nevmerzhitsky v. Ukraine* (no. 54825/00, § 54, ECHR 2005).

The trial court has the right to remit the case for an "additional investigation" (Article 281 of the CCP, see *Salov v. Ukraine*, no. 65518/01, § 43, ECHR 2005). The trial court may simultaneously decide to prolong the defendant's detention on remand by two months. Subsequent extensions can only be granted if the detention "pending the investigation" has not exceeded eighteen months (Article 156 of the CCP).

3. Time-limits for detention "pending trial"

From the date on which the prosecutor transmits the case file to the trial court, the defendant's preventive detention changes from detention "pending pre-trial investigation" to detention "pending trial".

Within ten, in complex cases thirty, days from the receipt of the case-file, the court must hold a preparatory hearing, at which it must examine, *inter alia*, the question of application, change or termination of a preventive measure such as detention on remand (Articles 237 and 241 of the CCP).

Article 273 of the Code of Criminal Procedure 1960 contains the rules on interim procedural decisions during trial proceedings. It provides, in particular, that certain types of interim decisions, including decisions relating to preventive measures, should be set out by the trial court in separate documents.

According to Article 274 of the Code of Criminal Procedure, the trial court may – if found appropriate – order, change or discontinue the defendant's detention during the trial proceedings. In so doing so, it must respect the relevant Articles of Chapter 13 of the Code of Criminal Procedure.

COMPLAINTS

1. The first applicant complained under Article 3 of the Convention that after his arrest he had been ill-treated in police custody.

2. He further complained under Article 5 § 1 (c) of the Convention that his arrest in November 2000 had been unjustified and unlawful. In particular, he complained that there had been no suspicion of his involvement in any crime and that the authorities had failed to inform the second applicant (his next-of-kin) about his arrest. The first applicant also complained that the excessive length of his detention on remand was contrary to Article 5 § 3 of the Convention and, invoking Article 5 § 4 and Article 13 of the Convention, that he had not had any effective remedy whereby he could challenge the lawfulness of his detention on remand. He further complained under Article 5 § 5 of the Convention that he had not had any right to compensation for the alleged violations of his rights under Article 5 of the Convention.

3. Relying on Article 6 of the Convention, the first applicant complained that, throughout the initial criminal investigation and the first set of trial proceedings, he had been prevented from appointing the second applicant as his defence counsel, and that the trial courts had rejected a request to hear two witnesses proposed by the defence. He further complained about the general unfairness of the proceedings in which he had been convicted.

4. The second applicant complained under Article 6 of the Convention that, in the civil proceedings initiated by her, she had not received a fair hearing and had been denied access to an appellate court.

The second applicant further complained that the City Court's rejection of her claim against the Police Department amounted to a violation of Article 8 of the Convention.

THE LAW

A. Article 5 §§ 3, 4 and 5 and Article 13 of the Convention

The first applicant complained that his preventive detention had lasted unreasonably long, that he had no remedy whereby he could effectively challenge the lawfulness of his detention and that, in this connection, he had had no enforceable right to compensation in respect of this alleged breach a right guaranteed by Article 5. He invoked Article 5 §§ 3, 4 and 5 of the Convention, which read as follows:

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

In respect of his complaint about the alleged lack of effective remedies against his preventive detention the first applicant also invoked Article 13 of the Convention, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Court notes that, as it relates to Article 5 of the Convention, the first applicant's complaint under Article 13 should be understood as referring to his alleged inability to effectively challenge his detention under Article 5 § 4 of the Convention. In addition, the Court observes that Article 5 § 4 of the Convention constitutes *lex specialis* in relation to the more general requirements of Article 13 (see *Tsirlis and Kouloumpas v. Greece*, judgment of 29 May 1997, *Reports of Judgments and Decisions* 1997-III, p. 927, § 73 and *Dobrev v. Bulgaria*, no. 55389/00, § 58, 10 August 2006). Accordingly, this complaint will have to be examined under Article 5 § 4 of the Convention.

The Court considers that it cannot, on the basis of the case file, determine the admissibility of the first applicant's complaints under Article 5 §§ 3, 4 and 5 of the Convention 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.

B. The remainder of the complaints

The Court has examined the remainder of the applicants' complaints as submitted by them. However, in the light of all the material in its

possession, and in so far as the matters complained of were within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

Accordingly, it rejects this part of the application in accordance with Article 35 §§ 3 and 4 of the Convention as being manifestly ill-founded.

For these reasons, the Court unanimously

Decides to adjourn the examination of the first applicant's complaint concerning Article 5 §§ 3, 4 and 5 of the Convention;

Declares the remainder of the application inadmissible.

Claudia WESTERDIEK
Registrar

Peer LORENZEN
President