CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIFTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 10205/04
by Oleksiy Andriyanovych MYROSHNYCHENKO
against Ukraine

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

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

Having regard to the above application lodged on 13 March 2004,

Having regard to the decision to apply Article 29 § 3 of the Convention and examine the admissibility and merits of the case together,

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Oleksiy Andriyanovych Myroshnychenko, is a Ukrainian national who was born in 1928 and lives in Jena, Germany. The

Ukrainian Government ("the Government") were represented by their Agent, Mr Y. Zaytsev.

A. The circumstances of the case

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

In 1988 the applicant retired and started receiving an old age pension.

On 12 July 1998 the applicant and his wife immigrated to Germany, where they were granted refugee status. Before their departure, on 3 July 1998, they had been paid their pension for six months in advance (12 July 1998 – 12 February 1999) with consecutive termination of payments in accordance with Article 92 of the Law on Pensions.

In October 2003 the applicant lodged a complaint with the Constitutional Court claiming that the termination of pension payments to him was unconstitutional. By letter of 23 October 2003 the Registry of the Constitutional Court replied to the applicant that he had no right to lodge a constitutional appeal.

In October 2003 the applicant raised the same issue with the Parliamentary Ombudsman for Human Rights. By letter of 29 April 2004, the Ombudsman's Secretariat replied that the only possible solution to the applicant's problem was the introduction of legislative changes since the termination of pension payments in case of emigration was directly foreseen by the law.

According to the applicant, in January 2004 he lodged a complaint with the Poltava Kievsky District Court, but received no reply.

By letter of 9 December 2003, the Supreme Court of Ukraine informed the applicant, in reply to his letter, that it had no competence to act as a first instance court in respect of the applicant's complaint.

In 2005 the applicant again submitted his complaint to the Constitutional Court, as well as to the General Prosecutor's Office and the President of Ukraine. By letter of 3 March 2005, the Constitutional Court replied to the applicant along the same lines as in its letter of 23 October 2003. The applicant's complaints to the General Prosecutor's Office and the President of Ukraine were redirected to the Constitutional Court, which in reply to the applicant referred to its previous letters of 23 October 2003 and 3 March 2005.

On 12 January 2006 the applicant lodged an administrative complaint with the Pechersky District Court of Ukraine against the Supreme Court and the Constitutional Court, the Ombudsman, the General Prosecutor's Office and the President of Ukraine for failure to protect elderly people who emigrated from Ukraine and failure to consider his complaints. On 27 January 2006 the court rejected this complaint for failure to comply with procedural requirements.

B. Relevant domestic law

1. Constitution of Ukraine of 1996

The relevant provisions read as follows:

Article 8

"... The norms of the Constitution of Ukraine are norms of direct effect. Appeals to the court in defence of the constitutional rights and freedoms of the individual and citizen directly on the grounds of the Constitution of Ukraine are guaranteed."

Article 24

"Citizens have equal constitutional rights and freedoms and are equal before the law.

There shall be no privileges or restrictions based on race, colour of skin, political, religious and other beliefs, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics..."

Article 147

"The Constitutional Court of Ukraine is the sole body of constitutional jurisdiction in Ukraine.

The Constitutional Court of Ukraine decides on issues of conformity of laws and other legal acts with the Constitution of Ukraine, and provides the official interpretation of the Constitution of Ukraine and the laws of Ukraine."

Article 150

"The jurisdiction of the Constitutional Court of Ukraine encompasses:

1) deciding on issues of conformity with the Constitution of Ukraine (the constitutionality) of the following:

- laws and other legal acts of the Verkhovna Rada of Ukraine;

- acts of the President of Ukraine;

- acts of the Cabinet of Ministers of Ukraine;

- legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea.

These issues are considered on the appeals of: the President of Ukraine; at least forty-five National Deputies of Ukraine; the Supreme Court of Ukraine; the Authorised Human Rights Representative of the Verkhovna Rada of Ukraine; the Verkhovna Rada of the Autonomous Republic of Crimea;

2) the official interpretation of the Constitution of Ukraine and the laws of Ukraine;

On issues envisaged by this Article, the Constitutional Court of Ukraine adopts decisions that are mandatory for execution throughout the territory of Ukraine, that are final and shall not be appealed."

2. Law of Ukraine on Pensions of 5 November 1991

Article 92. Payment of pensions to the citizens who left abroad.

"Pensions shall not be granted to citizens who left for permanent residence abroad.

The pensions granted in Ukraine before the leave for permanent residence abroad shall be paid for 6 months in advance before departure for abroad. During the stay of these citizens abroad only pensions granted for professional disability or illness shall be payable.

The procedure of transferring the pensions granted for professional disability or illness to other countries shall be established by the Cabinet of Ministers of Ukraine."

3. Law of Ukraine on General Obligatory State Pension Insurance of 9 July 2003

Article 51 of the Law contains provisions similar to those of second paragraph of Article 92 of the Law on Pensions, cited above. It further foresees that while abroad the person concerned should be paid pension, if such pension payments are foreseen by the international treaty ratified by the Parliament.

There is no treaty on social welfare between Ukraine and Germany.

COMPLAINTS

The applicant complained that the Ukrainian State did not protect his social rights. He invoked Article 1 of the Convention. He further complained that his complaints to different public authorities had been to no avail. He referred to Article 13 of the Convention. He also complained under Article 14 that he was discriminated on the ground of his place of residence.

THE LAW

The Government raised an objection as to the admissibility of the application. They maintained that the applicant had been aware of the impugned provisions of Article 92 of the Law of Ukraine on Pensions in July 1998 at the latest when the above provision had been applied to him. The Government considered that in the instant case the six months' period should be calculated from 3 July 1998, i.e. from the date when he became aware of the alleged violation of his rights.

The applicant did not agree with the Government.

The Court observes that under the Law on Pension the applicant, when leaving Ukraine for permanent residence abroad, was paid his pension six months in advance before his departure in July 1998 and subsequently the payment of his pension was suspended. Therefore, the act of which the applicant complained took place in July 1998, when he became aware or

had to become aware that the further payment of his pension was terminated under Article 92 of the Law on Pensions.

The Court recalls that the six-month time-limit in principle runs from the date of the act complained of, if no remedies are available or if they are judged to be ineffective (see *Hazar and Others v. Turkey* (dec.), no. 62566/00, 10 January 2002).

The Court notes that the applicant's complaint directly concerns a statutory provision which is clear and unambiguous. The courts of general jurisdiction in Ukraine, including the Supreme Court, do not have power to overrule the law (see, *Glova and Bregin v. Ukraine*, nos. 4292/04 and 4347/04, § 14, 28 February 2006). Moreover, in the Ukrainian legal system an individual has no right of individual petition to the Constitutional Court of Ukraine, which is the only jurisdiction empowered to repeal a statutory provision (see, *Pronina v. Ukraine*, no. 63566/00, § 24, 18 July 2006). In the *Pronina* judgment the Court also found that from the relevant legislation the Ukrainian legal system could not be understood as requiring the ordinary courts to examine in details any issue of constitutionality raised by a party to the civil proceedings, or obliging them to refer every such issue of constitutionality to the Constitutional Court (see, *Pronina* judgment, cited above, § 24). Furthermore, the Court reiterates that the Convention does not guarantee, as such, a right of access to a court with competence to invalidate or override a law, or to give an official interpretation of a law (see, *mutatis mutandis*, *Gorizdra v. Moldova* (dec.), no. 53180/99, 2 July 2002; and *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, § 81). Therefore, in the Court's view, the applicant had no remedy which could be considered effective in the circumstances of his case.

The Court considers that, in these circumstances, the six-month time-limit ran from 3 July 1998 when the applicant became aware of termination of his pension payments. Given that this application has been lodged more than five years later, i.e. 13 March 2004, the Court accepts the Government's preliminary objection and concludes that the application has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

Accordingly, the application of Article 29 § 3 of the Convention in the present case must be discontinued.

For these reasons, the Court unanimously

Declares the application inadmissible.

Claudia WESTERDIEK
Registrar

Peer LORENZEN
President