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

COURT (CHAMBER)

CASE OF BEIS v. GREECE

(Application no. 22045/93)

JUDGMENT

STRASBOURG

20 March 1997

In the case of Beis v. Greece[1],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A[2], as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr F. GÖLCÜKLÜ,
Mr L.-E. PETTITI,
Mr J. DE MEYER,
Mr N. VALTICOS,
Mr J.M. MORENILLA,
Mr L. WILDHABER,
Mr D. GOTCHEV,
Mr P. JAMBREK,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 29 November 1996 and 24 February 1997,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the Greek Government ("the Government") on 13 March 1996, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 22045/93) against the Hellenic Republic lodged with the European Commission of Human Rights ("the Commission") under Article 25 (art. 25) by a Greek national, Mr Konstantinos Beis, on 18 March 1993.

The Government's application referred to Articles 44 and 48 (b) of the Convention (art. 44, art. 48-b) and Rule 32 of Rules of Court A. The object of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6

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[1] The case is numbered 44/1996/663/849. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[2] Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

para. 1 and 13 of the Convention (art. 6-1, art. 13) and Article 1 of Protocol No. 1 (P1-1).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d), the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him.

3. The Chamber to be constituted included ex officio Mr N. Valticos, the elected judge of Greek nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 4 (b)). On 30 March 1996, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr L.-E. Pettiti, Mr B. Walsh, Mr J. De Meyer, Mr L. Wildhaber, Mr D. Gotchev and Mr P. Jambrek (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently Mr J.M. Morenilla, substitute judge, replaced Mr Walsh, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

4. As President of the Chamber (Rule 21 para. 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 19 September 1996 and the applicant's memorial on 23 September.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 27 November 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr P. GEORGAKOPOULOS, Senior Adviser,
Legal Council of State, *Delegate of the Agent*,
Mrs K. GRIGORIOU, Legal Assistant,
Legal Council of State, *Adviser*;

(b) for the Commission

Mr A. PERENIC, *Delegate*;

(c) for the applicant

Mr C. CHRYSSANTHAKIS, professor of law and member
of the Athens Bar, *Counsel*.

The Court heard addresses by Mr Perenic, Mr Chryssanthakis and Mr Georgakopoulos, and also their replies to questions put by four of its members.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

6. Mr Beis lives in Athens. He is professor of the law of civil procedure in the University of Athens.

7. In March 1992 the head of the Legal Service of the Greek Chamber of Technology (Techniko Epimelitirio Ellados - "the TEE"), a public-law entity (nomiko prosopo dimosiou dikeou) with all the immunities and other privileges of the State, instructed the applicant - orally and saying that he was "acting on behalf of the TEE" - to draw up two expert reports on proceedings brought against the TEE by Mr Philis and Mr Samaras; it was agreed that Mr Beis would be paid 7,500,000 drachmas (GRD) for the two reports. Mr Philis, an engineer, had brought two actions for damages against the TEE, which he accused of having badly defended his interests in an action to recover fees. Mr Samaras, a lawyer with a long-term contract with the TEE, had brought proceedings against it to challenge the termination of that contract.

8. Mr Beis submitted the two reports to the head of the TEE's Legal Service on 22 April 1992. However, the agreed fees were not paid to him. According to the applicant, the relevant member (paredros) of the Court of Audit (Elenktiko Synedrio) responsible for scrutinising the TEE's expenditure before payments were made orally opposed the payment on the ground that the reports could have been produced by the TEE's Legal Service and that the expenditure was therefore not lawful.

9. On 4 May 1992 the TEE's Governing Body requested a working party of seven experts - including the applicant - to (a) draft a bill designed to amend the rules providing for the TEE's subrogation to engineers' rights in their actions to recover fees, in the light of the European Court of Human Rights' judgment on the matter; (b) prepare a bill amending the provisions on the functioning of the TEE's Legal Service; (c) study the actions brought by Mr Philis, in order to assist the TEE's Legal Service by means of an expert opinion; (d) express an opinion on the prospects of success of the appeals pending in the case brought against the TEE by Mr Samaras; and (e) give any other advice likely to facilitate the TEE's work. It was expressly stated in the Governing Body's decision that the working party's tasks were to be "carried out jointly and with the cooperation" of all its members.

The working party was to submit its report by 15 June 1992. The remuneration was to be GRD 10,500,000, which was to be paid to the members of the working party after submission of the report, by a decision of the Governing Body and according to the work each had done. It was also stipulated that if the report was submitted late, the agreement would not

be valid and the members of the working party would forgo any action against the TEE to recover fees.

10. On 8 May 1992 five members of the working party informed the TEE's Legal Service that they had instructed Mr Beis to advise the TEE on the cases brought against it by Mr Philis and Mr Samaras. The applicant was to be paid GRD 7,500,000 out of the total sum offered by the TEE. The other tasks would be carried out by the other members, who would share the remainder of the sum.

11. On 12 June 1992 the vice-president of the TEE acknowledged receipt of the two expert reports submitted by the applicant on 22 April 1992 (see paragraph 8 above).

12. On 9 July 1992 the TEE issued a warrant (no. 3495) in favour of Mr Beis for payment of GRD 7,500,000 as remuneration for his membership of the working party between 5 May and 12 June 1992.

However, on 29 July 1992 an auditor (epitropos) from the Court of Audit - carrying out the prior scrutiny of the lawfulness of the expenditure to which the TEE is subject under Presidential Decree no. 766/1947 - refused to authorise payment of that sum, taking the view that the expenditure was unlawful (decision no. 20 of 29 July 1992); in his view, the report drawn up by the working party had been within the competence of the TEE's Legal Service. The TEE argued that the expenditure was lawful and on 18 August 1992 resubmitted the warrant for payment for approval by the Court of Audit's auditor. The latter, however, persisted in his refusal and on 16 September 1992 sent the case to the First Division of the Court of Audit.

13. On 5 October 1992, as a result of some procrastination on the TEE's part in paying him the agreed remuneration, the applicant made an ex parte application to a single judge of the Athens Court of First Instance (Monomeles Protodikio) for an order to pay (diatagi pliromis). His application was granted on 12 October 1992. The order to pay (no. 12207/92) was based on the following documents: the decision of the TEE's Governing Body of 4 May 1992, the acknowledgment of receipt of 12 June 1992 and the Governing Body's approval of 9 July 1992 for payment of the fees to the applicant.

On 21 October 1992 Mr Beis served the order to pay and the notice to comply on the TEE, but the latter made no payment. He served them again on 11 November 1992, after the time during which the TEE could have made an application to have the order set aside (anakopi) had expired (see paragraph 15 below).

On 24 November 1992 the First Division of the Court of Audit, to which the auditor had sent the case, ruled as follows (decision no. 631/1992):

> "In order that special problems of major importance arising in connection with the TEE's activities may be studied, special advisory committees or working parties may be set up, composed of technicians or researchers who are members of the TEE and

experts from other fields (lawyers etc.) who are not members of it, on the basis of a decision by the Governing Body (or a regional section of the TEE) for which due reasons must be given (as to the advisability of establishing such a body, its objectives, etc.).

These special advisory committees or working parties may sometimes be asked to study and carry out a specific `scientific project' connected with the general activities and functioning of the TEE and not solely of the specialised standing scientific committees (section 10 of Law no. 1486/1984), provided that the statutory requirements are satisfied, even where such a project comes within the competence of the TEE's standing bodies.

These special committees or working parties may, therefore, be given powers to study and carry out a scientific project relating to problems of major importance which normally come within the competence of the TEE's Legal Service under Article 1 of Presidential Decree no. 883/1980.

As part of their task, these special committees or working parties draw up their opinion after a preliminary meeting and exchange of views ...; only a procedure of this kind makes it possible to clarify the issue being dealt with and to facilitate a thorough study of it by the relevant executive bodies of the TEE.

An opinion given merely by a single member of one of these committees or working parties therefore does not fulfil the law's intention, even if that person acts under powers granted him by the other members, since in that eventuality the participation of those other members in the collegiate bodies would be pointless.

The remuneration which may be paid to the members of these special committees or working parties, as provided in section 14 (2) of Law no. 1486/1984 and in Article 1(d) of the legislative decree of 10 May 1946 (ratified by Law no. 28/1946), is laid down by the TEE's Governing Body. If the recipient is a civil servant or a salaried employee in the public sector (State, public-law entities, etc.) referred to in section 1 (6) of Law no. 1256/1982 ... - a university professor, for example - this remuneration must not exceed the threshold laid down in section 3 (4) of Law no. 1256/1982, in other words 30% of the office-holder's usual total salary, as laid down in joint decision no. 4391/2-3-1982 of the Prime Minister and Minister of Finance ..., adopted under section 3(4) of the aforementioned Law, which includes the basic salary, the length-of-service allowance, the study allowance, the family allowance, the corrective amount, the wage-indexation allowance and other allowances specific to certain categories of employee or civil servant.

The setting up of the working party to study `jointly and in cooperation' the special issues mentioned in decision no. 1238 adopted by the TEE's Governing Body at its 30th meeting on 4 May 1992 and to carry out the tasks set out in that decision must be regarded as lawful ..., regard being had to the capital importance of the issues in question for the functioning of the TEE and the inability of the TEE's Legal Service, which had competence in this instance, to deal with the issues satisfactorily.

The carrying out of this project individually by Mr Beis, one of the members of the working party, who drew up his opinions without any preparatory meeting being held or any exchange of views on the issues between the members of the working party, does not comply either with the TEE Governing Body's decision no. 1238/4 May 1992, whereby the members of the working party were instructed to carry out the

whole project `jointly', or with the provisions of Article 15 of the presidential decree of 27 November and 14 December 1926.

The joint statement of 8 May 1992 by five of the members of the working party, whereby they entrusted the carrying out of part of the project to Professor Beis, was made in contravention of the general principles of the functioning of collegiate administrative bodies, since there is nothing to show that all the (seven) members of the working party were invited to a joint meeting to take a decision; furthermore, it contravenes the terms of implementation of the whole project laid down by the Governing Body of the TEE in decision no. 1238/1992 and the provisions of Article 15 of the presidential decree of 27 November and 14 December 1926.

The expenditure which was the subject of the TEE's payment warrant was accordingly not lawful, by reason of, inter alia, the irregularities in the project's implementation.

In this connection, it is of little importance that it has not been proved in the instant case that the remuneration of a public servant for participation in a public-sector working party was within the limits laid down in section 3(4) of Law no. 1256/1992. The payment warrant in issue must accordingly not be approved."

14. On 3 December 1992, when the judicial order to pay had become final by virtue of Article 633 of the Code of Civil Procedure (see paragraph 15 below), Mr Beis applied to the Bank of Greece for attachment of a sum of GRD 7,500,000 in the TEE's account at the bank; the bank, however, did not react.

In the meantime, pursuant to the order to pay obtained ex parte, the TEE issued two new payment warrants (nos. 93 and 94) for a total of GRD 7,625,000. On 12 February 1993, however, the auditor in charge of the file at the Court of Audit refused to authorise payment on the ground that the Court of Audit was not bound by the fact that the judicial order to pay had become final after expiry of the time allowed for any application to have it set aside. Under the Court of Audit's settled case-law (see paragraph 16 below), the effect of orders of this kind is indeed limited and does not correspond to that referred to in Article 17 para. 3 of Presidential Decree no. 774/1980 on the Court of Audit (see paragraph 23 below). An ex parte order to pay therefore does not constitute a judicial act comparable to a final court decision.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Ex parte orders to pay

1. The Code of Civil Procedure

15. The relevant provisions of the Code of Civil Procedure are as follows:

Article 623

"Under the special procedure set out in Articles 623-34 of the Code of Civil Procedure, an order to pay may be sought in respect of a pecuniary claim or one pertaining to securities if the debt and the amount owed are proved by an officially recorded document or a private one."

Article 625

"The justice of the peace shall be competent to issue an order to pay where the claim comes within the jurisdiction of his court. In all other cases a single judge of the court of first instance shall be competent. No hearing shall be held upon an application for an order to pay."

Article 627

"The judge shall rule on the application as soon as possible, without summoning the debtor to attend ...; the judge shall, however, be entitled

(a) to require the applicant to attend to give explanations answering his application;

..."

Article 628

"1. The judge shall dismiss the application

(a) if the legal requirements for making an order to pay are not satisfied;

..."

Article 629

"The judge shall grant the application in so far as it is, in his view, founded in law and in fact, and shall order the debtor to pay the sum due and legal costs ..."

Article 631

"A judicial order to pay shall be enforceable."

Article 632 para. 1

"A debtor against whom an order to pay has been issued may apply to have it set aside within fifteen days of service of the order. The application to set aside shall be made to the court having jurisdiction ratione materiae to hear the case."

Article 633

"1. If an application to set aside has been properly made within the time prescribed by law and the reasons given for it are lawful and well-founded, the court shall set aside the order to pay; otherwise it shall dismiss the application to set aside and confirm the order to pay.

2. If the application to set aside has not been made within the time prescribed by law, the party in favour of whom the order to pay has been made may again serve that order on the debtor, who shall again be entitled to apply to have it set aside within a period of ten days ... If no application to set aside has been made within that time, the order to pay shall become final and may only be challenged by means of proceedings to reopen the case."

2. The Court of Audit's case-law

16. In a decision adopted at the tenth session of the full court on 6 March 1985 the Court of Audit held:

"It follows from the [aforementioned] provisions ... that when verifying the lawfulness of expenditure, the Court of Audit also, if necessary, verifies the entitlement of the creditor of the State, local authority or other public-law entity. If the issue of entitlement has become res judicata (within the meaning of Articles 322 et seq. of the Code of Civil Procedure) as a result of a judgment by a civil court, that judgment is binding on the Court of Audit.

It is clear that the estoppel per rem judicatam which thus prevents the Court of Audit reopening that issue derives from the fact that the civil court has examined the merits, in law and in fact, of the claim ...

If, further, it is taken into consideration that by Article 633 para. 2 (b) of the Code of Civil Procedure, an order to pay does not create an estoppel per rem judicatam but merely 'becomes final', it may be asserted that the effect of an ex parte order to pay, just like its limits in objective and subjective terms, is not identical with that of a court decision and of its functions and limits.

This is because an order to pay is not a court decision and, by Articles 631 and 904 para. 2 (b) of the Code of Civil Procedure, is made, after the special procedure laid down in Articles 623 et seq. of that Code, solely to provide an enforceable instrument.

The review undertaken when an application is made under Articles 632 and 633 of the Code of Civil Procedure to set aside an order to pay does not cover the right in issue but relates merely to the validity of the order to pay as an enforceable instrument.

In the light of the foregoing, accepting the contrary argument that the effect of an order to pay does not differ from that of a court decision or is not of limited scope is to call in question the constitutionality of the effect of an order to pay, as the latter is made without the debtor being summoned and without any adversarial hearing

It must therefore be considered that the effect of an order to pay is merely to deprive the defendant of his right to raise preliminary objections unreasonably, such an estoppel resembling ... the negative aspect of the estoppel per rem judicatam created by a court decision (in that the objections may not be considered again).

Consequently, the effect of an order to pay does not extend to a finding as to the right in issue (the positive aspect of res judicata); that being so, the Court of Audit is not bound by such an order when it verifies the lawfulness of expenditure, the claim merely being made enforceable by such an order.

None of the foregoing deprives an order to pay of its enforceability, although naturally that does not prejudice the provisions on immunity from execution enjoyed under section 8 of Law no. 2097/1952 by the Greek State and, as a result of a broad construction of that statute, by local authorities and other public-law entities.

...

Acknowledgment and settlement of expenditure, like the orders to pay relating to it, presuppose that the right of the creditor of the State, local authority or other public-law entity has been proved by means of relevant documents, as it is not sufficient to rely on a claim whose enforceability derives from a judicial order to pay, even if that order has become final.

It must accordingly be accepted that when verifying the lawfulness of expenditure, the Court of Audit is not bound by the limited effect of the order to pay ..., as that effect does not have the characteristics of the binding force referred to in paragraph 3 of Article 17 of Presidential Decree no. 774/1980 on the Court of Audit.

It follows that the right conferred by the effect of the order to pay on the person who is claiming to be entitled to the amount of the expenditure does not ipso facto make that expenditure lawful and that the Court of Audit is under an obligation to verify the lawfulness of that expenditure in all its aspects."

B. Enforcement

1. Law no. 2097/1952 regulating certain cases to which the Law on the collection of public receipts relates

17. Section 8 of Law no. 2097/1952 provides:

"Enforcement of judicial decisions (of civil or criminal courts, the Supreme Administrative Court and the Court of Audit) whereby the State is ordered to pay a debt or legal costs shall be prohibited, as shall be that of any authority to execute to the effect that the State must pay such a debt.

Service of a demand for payment of such debts shall be prohibited and if it is effected nonetheless, such service shall in no way bind the State."

2. Case-law

18. The courts have accepted that the statutory provisions whereby a public-law entity enjoys the same rights as the State in judicial matters (Court of Cassation, judgment no. 108/71, "Greek Lawyers' Review" no. 38, p. 317) or "enjoys, in general, on the same footing as the State, all the judicial, administrative, financial or other immunities and rights of the State" (decision no. 2311/1979 of the Athens Court of First Instance, "Greek Lawyers' Review" no. 38, p. 762) have the consequence that the provisions of section 8 of Law no. 2097/1952 apply to an entity of that kind.

The Court of Cassation has ruled (in judgment no. 1039/1995) that section 8 of Law no. 2097/1952 is consistent with the Greek Constitution and the European Convention in these terms:

"The privilege of immunity from execution enjoyed by the Greek Railways Board ('the OSE') is not contrary to Article 4 para. 1 of the Constitution, relating to the equality of citizens before the law, as that provision excludes only the creation by the legislature of privileged positions with regard to certain persons; it does not, however, preclude the legislature from making special rules ... where they are necessary in the interests of society or the public. Such reasons exist here because the preferential treatment given to the OSE is justified by the vital social objective the OSE pursues, namely the provision of rail transport; it follows that the State has a direct interest in ensuring that the OSE operates without hindrance. Nor is this privilege contrary to Article 20 of the Constitution guaranteeing citizens' rights to legal protection by the courts ... Furthermore, extension to the OSE of the privilege of immunity from execution enjoyed by the State is not contrary either to Article 1 of the First Protocol (P1-1) of 20 May 1952 ... or, lastly, to Article 6 para. 1 (art. 6-1) of the Rome Convention of 4 November 1950 ..., as those Articles (P1-1, art. 6-1) regulate other matters and not questions such as the present one, with which they are quite unconnected."

As to the TEE, Article 41 of the presidential decree of 27 November and 14 December 1926 on the establishment of the TEE provides:

"The TEE shall correspond independently and enjoy all the privileges and immunities of the State, taking precedence immediately after the National Engineering School."

C. Garnishee proceedings

19. The relevant Articles of the Code of Civil Procedure provide:

Article 985

"1. Within eight days of service of the notice of the garnishee order, the garnishee shall be required to declare whether the attached debt exists, whether the attached asset is in his possession and whether the asset is subject to another garnishee order emanating from someone else and, if so, for what sum.

2. The declaration referred to in paragraph 1 shall be made orally to the clerk to the justice of the peace for the declarant's place of residence, who shall make a record of it.

3. Failure to make a declaration shall be tantamount to a negative declaration. Failure to make a declaration or the making of an inaccurate one shall render the garnishee liable in damages to the creditor."

Article 986

"Within thirty days of the making of the declaration referred to in Article 985, the creditor shall be entitled to have the declaration set aside by the court ... An application for compensation under Article 985 para. 3 may be made at the same time."

20. In judgment no. 3/1993 the Court of Cassation, sitting as a full court, held that Greek banks were prohibited by their confidentiality obligations from supplying information about bank accounts even where the account-holder had consented to disclosure. The existence of that prohibition - failure to comply with which was a criminal offence - meant that a bank's failure to make the declaration referred to in Article 985 of the Code of Civil Procedure was not tantamount to a negative declaration within the meaning of that Article and could not be made the subject of an application to set aside under Article 986. Thus the law indirectly prohibited attachments of assets in the hands of Greek banks, but that did not impair the legal protection afforded by court decisions or judicial orders to pay obtained ex parte. That conclusion was also confirmed by the fact that the legislature had not added to the rules on bankers' confidentiality obligations a provision expressly permitting such attachments (Dike, vol. 5, May 1994, pp. 497-506).

D. Relevant provisions relating to the TEE

21. Article 1 of Presidential Decree no. 883/1980 provides:

"There shall be set up within the TEE a Legal Service with the following duties: (a) to be responsible for the conduct of litigation and proceedings to which the TEE is a party and the protection of the TEE's legal and non-legal interests before all judicial or administrative authorities ...; (b) to assist the TEE's organs and departments by giving opinions on legal questions submitted to it; (c) to produce the drafts of bills, decrees, etc., suggested by the TEE; and (d) to draw up contracts of all types between the TEE and third parties."

In addition, by Article 15 of the presidential decree of 27 November and 14 December 1926 establishing the TEE:

> "... If necessary, special committees shall be set up to consider specific problems or working parties to implement a specific scientific project; in addition to [members of the TEE], specialists in other fields who are not members of the TEE may also sit on these ..."

The TEE's expenditure is dealt with in the single Article of Presidential Decree no. 766/1974, which provides:

> "The following public-law entities shall not incur expenditure without prior authorisation from the Court of Audit: ... (2) The Greek Chamber of Technology (TEE) ..."

E. The Constitution

22. Article 98 of the Constitution provides:

> "1. The Court of Audit shall be competent, in particular,
>
> (a) to scrutinise expenditure by the State, local authorities or other public-law entities made subject to its control by special laws ...
>
> 2. The powers of the Court of Audit shall be determined and exercised in accordance with the law ...
>
> 3. The judgments of the Court of Audit in the cases referred to in paragraph 1 shall not be subject to review by the Supreme Administrative Court."

F. The Court of Audit's control of public expenditure

23. Article 17 of Presidential Decree no. 774/1980 on the Court of Audit provides:

> "1. The Court of Audit
>
> (a) ...
>
> (b) shall, under Article 98 of the Constitution, scrutinise the expenditure of the State and local authorities and other public-law entities made subject to this control by special laws, in order to verify that each item of expenditure is charged to an appropriation authorised by law and that it has been incurred in accordance with the provisions of the Code of Public Accounts and the other relevant statutes or regulations.
>
> 2. ...
>
> 3. In the exercise of its powers of review, the Court of Audit may, if necessary, examine any ancillary issue that arises, subject to the provisions on res judicata.

4. ...

5. The Court of Audit shall not have jurisdiction to review the appropriateness of administrative acts.

..."

The procedure for prior scrutiny of expenditure (before payment) is set out in Article 21 of the decree, which provides:

"1. If the scrutiny carried out shows that the requirements of paragraph 1 (b) of Article 17 are, in respect of a given item of expenditure, wholly or partly unsatisfied, the competent member or auditor shall, in a reasoned decision, refuse to approve the payment warrant issued by the authority concerned and shall return the warrant with a copy of his decision to that authority.

If the payment warrant is resubmitted to him, the relevant member or auditor may either approve it - if the impediments to approval have in the meantime be removed - or send it with his report to the appropriate division of the Court of Audit, which shall rule ...

The appropriate division of the Court of Audit ... may, on account of the major importance or public interest of the question raised, refer the case to the full court of the Court of Audit ...

2. If the payment warrant has not been approved, the appropriate Minister may seek the requisite approval from the Court of Audit on his own responsibility ...

If the warrant is approved on the Minister's responsibility, Principal State Counsel at the Court of Audit shall file a report with the Minister of Finance, the Cabinet and Parliament stating why payment has not been approved. If Parliament ... does not ratify the warrant thus approved, the Court of Audit, sitting as a full court, shall order that the Minister concerned shall be liable for the amount stipulated in the warrant.

..."

PROCEEDINGS BEFORE THE COMMISSION

24. Mr Beis applied to the Commission on 18 March 1993. He maintained that the TEE's refusal to comply with a final order to pay and the fact that in domestic law there was no means of compelling the TEE to comply infringed Articles 6 para. 1 and 13 of the Convention (art. 6-1, art. 13) and Article 1 of Protocol No. 1 (P1-1).

25. The Commission (First Chamber) declared the application (no. 22045/93) admissible on 11 January 1995. In its report of 5 December 1995 (Article 31) (art. 31), it expressed the unanimous opinion that there had been a violation of Article 6 para. 1 of the Convention (art. 6-1) and Article 1 of Protocol No. 1 (P1-1) and that no separate issue arose under

Article 13 of the Convention (art. 13). The full text of the Commission's opinion is reproduced as an annex to this judgment[3].

FINAL SUBMISSIONS TO THE COURT

26. In their memorial the Government submitted that the applicant's application must be declared inadmissible or be dismissed as being unfounded.

27. The applicant requested the Court to "make a formal finding that the Hellenic Republic has committed the violations, to award [him] compensation for the pecuniary and non-pecuniary damage [he has] sustained and the costs and expenses he has incurred in the preparation of this application, under Article 50 of the Convention (art. 50)".

AS TO THE LAW THE GOVERNMENT'S PRELIMINARY OBJECTION

28. As they had done before the Commission, the Government maintained that Mr Beis had failed to exhaust domestic remedies as he had not brought a civil action in the ordinary courts (as opposed to making an ex parte application for a payment order) or applied to the Court of Audit for an order setting aside its decision no. 631/1992 (see paragraph 13 above) or challenged the Bank of Greece's implied refusal to advise him whether or not the TEE had funds at that bank.

29. The applicant argued that the TEE had not applied - as it was entitled to do under Article 633 of the Code of Civil Procedure (see paragraph 15 above) - to have the payment order set aside. That order had therefore become final and afforded him effective judicial protection as his debtor could only have obtained release from its debt to him by making an application for the proceedings to be reopened, and it had not done so. If he, as a creditor, had then brought a civil action, it would have been declared inadmissible on the ground that he had no legal interest. Moreover, he could not have been expected to bring lengthy and costly civil proceedings when his debt was already protected by a final order for payment that was enforceable and could not be challenged by the TEE.

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[3] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1997-II), but a copy of the Commission's report is obtainable from the registry.

As to the second limb of the objection, any further application to the Court of Audit would have been pointless since, under its settled case-law, it did not consider itself bound by an order to pay (see paragraph 16 above).

Lastly, with respect to the third limb of the objection, a challenge would have had no practical effect, owing to the TEE's immunity from execution and the fact that the courts had held that creditors could not attach their debtors' bank deposits (see paragraphs 17 and 20 above).

30. The Commission had already considered the objection. In its decision on admissibility it had decided to examine the three limbs when considering the merits.

31. The Court is not minded, however, to follow the Commission's approach in this regard. It notes at the outset that the instant case is concerned with a private individual's inability to secure payment of his remuneration for work done for a public-law entity because of the opposition of the body responsible for verifying the lawfulness of public expenditure and notwithstanding an order to pay issued by a judge of the court of first instance.

32. Under Article 26 (art. 26) normal recourse should be had by an applicant to remedies which are available and capable of remedying the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice. Article 26 (art. 26) also entails a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that an effective remedy existed at the relevant time. Once they have done so, it falls to the applicant to establish that the remedy advanced by the Government was ineffective in the particular circumstances of the case or that there existed special circumstances absolving him from having to make use of it.

In applying the rule of exhaustion, the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the context in which they operate and the personal circumstances of the applicant (see the Akdivar and Others v. Turkey judgment of 16 September 1996, Reports of Judgments and Decisions 1996-IV, pp. 1210-11, paras. 66-69).

33. So far as the first limb of the objection is concerned, the Court notes that Mr Beis's remuneration was considered to be unlawful both by the relevant member of the Court of Audit - when the agreement between the applicant and the head of the TEE's Legal Service was concluded (see paragraph 8 above) - and by the auditor of the Court of Audit, when the applicant was officially instructed to draw up his report as a member of the working party established by the TEE (see paragraph 12 above). Despite initial hesitation (see paragraph 13 above), the TEE still wished to pay Mr Beis; it did not seek to have the order to pay set aside and even issued two new warrants for payment after the order to pay had become final

within the meaning of Article 633 para. 2 of the Code of Civil Procedure (see paragraphs 13-14 above).

34. In his book on civil procedure the applicant himself recognises, in the chapter on ex parte orders to pay, that the fact that a debtor has lost the right to challenge such an order and to apply for it to be set aside does not mean that the order to pay creates an estoppel per rem judicatam, which is a characteristic of court decisions. In spite of its binding nature, an order to pay - which emanates from a judge - does not create an irrebuttable presumption that the legal act that gave rise to the debt was valid (K. Beis, Politiki Dikonomia, A. Sakkoulas, Athens, vol. IV, pp. 157-58, 199 and 255-56).

Those statements are of particular importance in the circumstances of the present case as the applicant's remuneration represented public expenditure incurred by a public-law entity, the TEE, and, as such, subject to prior scrutiny by the Court of Audit.

35. The applicant, a professor of the law of civil procedure, was well placed to assess whether, having regard to the aforementioned position taken up by the relevant organs of the Court of Audit and especially the full court's decision of 6 March 1985 (which, though not connected with the facts of the instant case, was delivered well before they arose), an application for an order to pay was sufficient and appropriate to ensure that he received his remuneration (see, mutatis mutandis, the Melin v. France judgment of 22 June 1993, Series A no. 261-A, p. 12, para. 24); the Court of Audit had said in that decision that, when considering the lawfulness of public expenditure, it was bound only by judicial decisions on the merits - which, unlike orders to pay, concerned a determination of the right underlying the debt (see paragraph 16 above).

36. The Court notes that Mr Beis had - as indeed he admitted - a choice between applying ex parte for an order to pay and bringing a civil action in the ordinary courts. The first course, which he chose and which was admittedly quicker and cheaper than the latter, did not suffice because of the Court of Audit's supervising organs' refusal to authorise the expenditure for payment of his remuneration, in the light notably of that court's decision of 6 March 1985. In contrast, the second course, which the applicant could have taken from the time the TEE hesitated to pay him the sum due (see paragraph 13 above), would have enabled him to rely on a decision that would have been binding on the relevant organs of the Court of Audit and would even have made it possible to have the decision of the First Division of that court set aside (ibid.).

In the circumstances of the case, the Court considers that the applicant did not make use of an adequate and effective remedy such as would have afforded the Greek authorities the opportunity of putting right the alleged violations. The first limb of the objection of failure to exhaust domestic remedies is therefore well-founded.

37. That conclusion makes it unnecessary to consider the other limbs of the objection.

FOR THESE REASONS, THE COURT

Holds by eight votes to one that, as domestic remedies have not been exhausted, it is unable to consider the merits of the case.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 20 March 1997.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the dissenting opinion of Mr Ryssdal is annexed to this judgment.

R. R.
H. P.

DISSENTING OPINION OF JUDGE RYSSDAL

(Translation)

I regret that I am unable to concur in the opinion set out in paragraphs 32 et seq. of the judgment.

Notwithstanding that the TEE may not have been authorised to conclude the agreement concerned with Mr Beis, that agreement was made and Mr Beis performed his part of it. After the TEE had issued the payment warrant, Mr Beis made an application to the appropriate judge, who granted him an order to pay, which under Articles 623 et seq. of the Greek Code of Civil Procedure is an enforceable instrument (Article 631) and becomes final if no application is made within the prescribed time to have it set aside (Article 633 para. 2, last sentence).

Under Greek law - as indeed under the law of several other countries - a creditor is given a choice between bringing ordinary proceedings or following the simplified procedure for obtaining an ex parte order to pay. Where the law offers several courses of action, it is for the person concerned to choose the one that appears to him to be most suitable in his case.

For reasons which he does not have to account for, Mr Beis chose to apply for an order to pay. Had the debtor wished to challenge the lawfulness of that order, it could have had the order set aside and the creditor would subsequently have had to bring ordinary proceedings.

Since no application was made to have the order to pay set aside, it became final and enforceable. The fact that, unlike a judgment delivered in ordinary proceedings, an order to pay does not give rise to an estoppel per rem judicatam is not decisive.

As soon as the order to pay was made, the applicant was entitled to payment of the amount stated in it. When faced with the Court of Audit’s refusal, he was therefore under no obligation to bring ordinary civil proceedings, irrespective of whether such proceedings would have been declared inadmissible because he had no interest in bringing them.

I conclude that the applicant exhausted domestic remedies within the meaning of Article 26 of the Convention (art. 26).