



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

SECOND SECTION

**CASE OF TEREM LTD, CHECHETKIN AND OLIUS v. UKRAINE**

*(Application no. 70297/01)*

JUDGMENT

STRASBOURG

18 October 2005

**FINAL**

*18/01/2006*

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of Terem Ltd, Chechetkin and Olius v. Ukraine,**

The European Court of Human Rights (Second Section), sitting 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 Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 27 September 2005,

Delivers the following judgment, which was adopted on that date:

## PROCEDURE

1. The case originated in an application (no. 70297/01) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian company, Terem Ltd, and two Ukrainian nationals, Mr I. Chechetkin and Mr Ye. Olius (“the applicants”), on 30 May 2001.

2. The Ukrainian Government (“the Government”) were represented by their Agents, Mrs V. Lutkovska and Mrs Z. Bortnovska.

3. On 19 November 2004 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

4. The first applicant, Terem Ltd, is a Ukrainian company registered in 1998. The second applicant, Mr Igor Vladimirovich Chechetkin is a Ukrainian national, who was born in 1967 and lives in Kiev. The third applicant, Mr Yevgeniy Vitalyevich Olius, is also a Ukrainian national, who was born in 1957 and lives in Kiev. The second and third applicants are co-owners of the first applicant.

5. In November 1999 the property and financial documents belonging to the first applicant were seized by the tax police during a control of the company's compliance with tax regulations.

6. On 10 February 2000 a major part of the first applicant's property was declared to be "without an owner" by the Kiev Tax Police Department (hereinafter – "the KTPD"). On 3 March 2000 the Zhovtnevyy District State Administration decided to sell the property, which it then did.

7. In May 2000 the second and third applicants lodged a complaint with the Radyanskiy District Court of Kiev against the KTPD for its allegedly unlawful actions with respect to the first applicant.

8. On 10 October 2000 the court found for the applicants.

9. On 7 February 2001 the Kiev City Court quashed the decision of the first-instance court and terminated the proceedings for lack of jurisdiction, having established that the proper claimant in the case was the first applicant, which meant that the claim had to be considered by the commercial courts.

10. In March 2002 the first applicant, represented by the other two, filed a claim with the Kiev Commercial Court against the KTPD and the State Treasury, seeking compensation for material and moral damage caused by the actions of the tax police.

11. On 6 June 2003 the court found in part for the first applicant and awarded it UAH 5,655,475.40 in compensation for material and non-material damage and UAH 4,002.60 for the court fees<sup>1</sup>. In its decision the court established the unlawfulness of the actions of the KTPD and the resulting damage caused to the first applicant.

12. On 6 October 2003 the Kiev Appellate Commercial Court upheld the decision of the first-instance court.

13. On 22 October 2003 the Kiev Commercial Court issued two writs of execution for the amounts awarded in the decision of 6 June 2003.

14. On 10 December 2003 the Shevchenkivskiy District Bailiffs' Service initiated enforcement proceedings in the case.

15. On 17 January 2004 the State Treasury informed the Bailiffs' Service that, pursuant to domestic law, it was for the Treasury to enforce the judgment, not the Bailiffs' Service.

16. On 23 February 2004 the Bailiffs' Service returned the writs of execution to the first applicant and proposed that it submit them to the State Treasury for enforcement.

17. On 25 February 2004 the first applicant forwarded the writs of execution to the State Treasury.

18. On 5 April 2004 the Highest Commercial Court of Ukraine upheld the decisions of the lower courts of 6 June and 6 October 2003.

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<sup>1</sup> The current value of the total award is around 926,113 euros ("EUR").

19. On 1 July 2004 the panel of three judges of the Supreme Court of Ukraine rejected the request of the KTPD for a review of the decision of 5 April 2004 in cassation.

20. By letter of 22 July 2004, the Kiev Department of the State Treasury informed the applicants that the decision of 6 June 2003 could not be enforced in the absence of legal grounds. In particular, it noted that the reimbursement of the value of the property confiscated by the State was limited to the sum obtained from the sale of the property, a matter to be confirmed by the tax authorities.

21. On 5 August 2004 the Kiev Commercial Court rejected the request of the KTPD to suspend the enforcement of the judgment of 6 June 2003.

22. On 9 September 2004 the judge of the Supreme Court of Ukraine rejected a further request of the KTPD for a review of the decision of 5 April 2004, on the ground that the Supreme Court had rejected this request in its final decision of 1 July 2004.

23. On 20 December 2004 the State Treasury transferred UAH 356,973.55<sup>1</sup> to the bank account of the first applicant.

24. By letter of 16 February 2005, the Kiev Department of the State Treasury informed the first applicant that the Treasury had transferred to it the amount obtained from the sale of the confiscated property. Further enforcement, however, could not be conducted due to the lack of appropriate allocations in the State Budget of Ukraine for the years 2004 and 2005.

25. The judgment in favour of the first applicant remains to large extent unenforced.

## II. RELEVANT DOMESTIC LAW

26. The relevant domestic law is summarised in the judgment of *Voytenko v. Ukraine* (no 18966/02, §§ 20-25, 29 June 2004).

## THE LAW

27. The applicants originally complained under Article 1 of Protocol No. 1 about the unlawful confiscation of their property. The applicants also complained that the domestic courts had denied them access to court to challenge the unlawful actions of the tax police. They invoked Articles 6 and 13 of the Convention. The applicants later complained about the non-enforcement of the judgment given in favour of the first applicant,

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<sup>1</sup> Currently around EUR 58,415

and again invoked Article 6 of the Convention and Article 1 of Protocol No. 1. These provisions, in so far as relevant, read as follows:

**Article 6 § 1**

“In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...”

**Article 13**

“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.”

**Article 1 of Protocol No. 1**

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

**I. ADMISSIBILITY**

**A. Compatibility *ratione personae***

28. The Court recalls that under Article 34 of the Convention it may receive applications from individuals and others “claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto”. In order to claim to be a victim of a violation, a person must be directly affected by the impugned measure (see, for example, *Buckley v. the United Kingdom*, judgment of 25 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 128, §§ 56-59). The concept of “victim” in Article 34 must be interpreted autonomously and independently of domestic law concepts, such as a capacity to bring or take part in legal proceedings (*Greek Federation of Customs Officers, Gialouris and others v. Greece*, no. 24581/94, Commission decision of 6 April 1995, DR 81-B, p. 127). The Court recalls further that the shareholders of a company, including the majority shareholders, cannot claim to be victims of an alleged violation of the company’s rights under the Convention (see *Agrotexim and Others*

*v. Greece*, judgment of 24 October 1995, Series A no. 330-A, pp. 22-26, §§ 59-72).

29. Turning to the facts of the present case, the Court notes that the second and third applicants are two out of the three co-owners of the first applicant, and they complained about a violation of their corporate rights in the latter. The Court refers to its case law cited above and finds no reason to depart from it in the instant case.

30. It follows that the complaints of second and third applicant are incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

## **B. The first applicant's original complaints**

### *1. Article 1 of Protocol No. 1*

31. The first applicant (hereinafter “the applicant”) originally complained under Article 1 of Protocol No. 1 about the unlawful confiscation of its property by the tax police.

32. The Court notes that this applicant's complaint was effectively remedied at the domestic level and the applicant was awarded the equivalent of around EUR 926,113 in compensation for material and moral damage, plus court fees. This award does not appear to have been unreasonable. That being so, the applicant may no longer claim to be a “victim”, within the meaning of Article 34 of the Convention. The fact that the awarded amount remains unpaid for a considerable period of time raises a separate issue of non-enforcement, which will be considered below.

33. It follows that the confiscation complaint in itself is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

### *2. Articles 6 § 1 and 13 of the Convention*

34. The applicant also complained that the domestic courts denied it access to a court to challenge the unlawful actions of the tax police, thereby denying it an effective remedy. However, once the applicant lodged its claim with the competent jurisdiction, namely the commercial courts, a full examination was made. The Court finds, therefore, that it had adequate access to a court.

35. It follows that these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

### **C. The first applicant's complaint about the non-enforcement of the judgment in its favour**

#### *1. The Government's preliminary objection*

36. The Government maintained that the applicant had failed to challenge the alleged inactivity of the State Treasury in enforcing the judgment in its favour before the domestic courts.

37. The applicant maintained that, in the circumstances of the case, it was clear that the enforcement of the judgment could only be completed by amending the law, and it did not have even a theoretical possibility to challenge the legislation before the domestic authorities. Moreover, it stressed that in numerous judgments against Ukraine, the Court has held that, if the enforcement of a judgment was prevented because of a lack of legislative measures, rather than by the misconduct of the authority responsible for the enforcement, the applicant could not be reproached for not having taken proceedings against that authority.

38. The Court agrees with the applicant and recalls that it has dismissed a similar objection by the Government in previous applications (see for example the *Voytenko* judgment, cited above, § 30). In such cases the Court has found that the applicants were absolved from pursuing the remedies invoked by the Government. It finds no reason to reach a different conclusion in the present case and, therefore, rejects the Government's objection.

#### *2. Conclusions*

39. In the light of the parties' submissions, the Court concludes that the first applicant's complaints about the non-enforcement of the judgment in its favour under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 raise serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. It finds no ground for declaring this part of the application inadmissible. In particular, the Court considers that the proceedings in question did concern the "determination of civil rights and obligations" (see, *a contrario*, *Ferrazzini v. Italy* [GC], no. 44759/98, § 29, ECHR 2001-VII).

## II. MERITS

### **A. The first applicant's complaints under Article 6 § 1 of the Convention**

40. The Government maintained that there were legitimate restrictions in Ukrainian legislation which prevented the State Treasury's enforcement of the judgment in the applicant's favour. They reiterated that the applicant had not challenged any omissions of the State Treasury.

41. The applicant disagreed.

42. The Court accepts that appropriations for the payment of State debts may cause some delay in the enforcement of judgments from the Government's budget (see the aforementioned *Voytenko* judgment, § 42). Nevertheless, the Court considers that, by failing to make such appropriations for two consecutive years, the respondent State fell short of its obligations under Article 6 § 1 of the Convention. Moreover, it appears from the case-file that no recent steps have been taken by the State authorities to remedy the situation in the present case.

43. The Court, concludes, therefore, that the continued non-enforcement of a substantial part of the judgment debt in the first applicant's favour constitutes a violation of Article 6 § 1 of the Convention.

### **B. The first applicant's complaints under Article 1 of Protocol No. 1**

44. The Government conceded that the sums awarded to the applicant by the domestic courts constituted a possession within the meaning of Article 1 of Protocol No. 1. Nevertheless, the Government maintained that the provision had not been violated since the applicant's entitlement to the award was not disputed and it was not deprived of its property. The Government further noted that the delay in payment was due to the country's difficult economic situation and the significant amount of the debt.

45. The applicant disagreed.

46. The Court recalls its case-law that the impossibility for an applicant to obtain the execution of a judgment in his or her favour constitutes an interference with the right to the peaceful enjoyment of possessions, as set out in the first sentence of the first paragraph of Article 1 of Protocol No. 1 (see, among other authorities, *Burdov v. Russia*, no. 59498/00, § 40, ECHR 2002-III; *Jasiūnienė v. Lithuania*, no. 41510/98, § 45, 6 March 2003).

47. In the instant case the Court is therefore of the opinion that the impossibility for the applicant to obtain the execution of its judgement for a period of almost two years constitutes an interference with its right to the

peaceful enjoyment of its possessions, within the meaning of the first paragraph of Article 1 of Protocol No. 1.

48. By failing to comply with the judgment of the Kiev Commercial Court, the national authorities have prevented and still prevent the applicant, for a considerable period of time, from receiving in full the money to which it is entitled. The Court considers that a lack of budget funds cannot justify such an omission.

Accordingly there has also been a violation of Article 1 of Protocol No. 1.

### III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

#### A. Damage

50. The applicant claimed EUR 804,022 as compensation for direct material damage, EUR 177,011 as compensation for loss of profits, plus EUR 35,402 for every further three months of delay in the enforcement of the judgment, and EUR 65,554 as compensation for the damage to its business reputation.

51. The Government invited the Court to reject the applicant’s claim for pecuniary damage. They maintained that the applicant was entitled to the outstanding judgment debt under domestic law and, therefore, by awarding an amount equivalent to that debt, the applicant could receive double payment. For this reason the Government invited the Court to reject the applicant’s claim for direct material damage. They further maintained that there was no causal link between the alleged violation and the claimed amount of lost profits.

52. The Court recalls that it is undisputed that the State still has an outstanding obligation to enforce the judgment at issue. Accordingly, the applicant remains entitled to recover the remaining amount of the judgment debt and, if the Government were to pay this debt, it would constitute full and final settlement of the claim for pecuniary damage<sup>1</sup>.

53. As to non-pecuniary damage, the Government invited the Court to follow its case-law concerning non-execution judgments. However, the applicant made no such claim; therefore the Court makes no such award.

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<sup>1</sup> Last known to the Court to be UAH 5, 302504.50 (currently around EUR 867,698)

## **B. Costs and expenses**

54. The applicant did not submit any claim under this head. The Court therefore makes no award.

## **C. Default interest**

55. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## **FOR THESE REASONS, THE COURT UNANIMOUSLY**

1. *Declares* the complaint of the first applicant concerning the non-enforcement of the judgment of 6 June 2003 admissible, and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* that there has been a violation of Article 1 of Protocol No. 1;
4. *Holds*
  - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the outstanding amount of the judgment debt of 6 June 2003 still owed to it;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on that sum at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 18 October 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ  
Registrar

J.-P. COSTA  
President