



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

FIFTH SECTION

CASE OF UKRAINE-TYUMEN v. UKRAINE

(Application no. 22603/02)

JUDGMENT
(merits)

STRASBOURG

22 November 2007

FINAL

22/02/2008

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 Ukraine-Tyumen v. Ukraine,

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

Mr P. LORENZEN, *President*,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr R. MARUSTE,
Mr J. BORREGO BORREGO,
Mr M. VILLIGER, *judges*,

and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 23 October 2007,

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

PROCEDURE

1. The case originated in an application (no. 22603/02) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by the Ukraine-Tyumen Joint Stock Company (“the applicant”) on 23 July 2001.

2. The applicant was represented by Mr V. Bondarchuk, its president, and Messrs M. Onischuk and E. Ugrinchuk, lawyers practising in Kyiv. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. On 13 March 2006 the Court decided to give notice of 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 applicant is a Ukrainian joint venture based in Kyiv, with legal personality under Ukrainian law.

5. In June 1995 the Governor of the Tyumen Region of the Russian Federation submitted a proposal to the President of Ukraine to co-fund a joint venture for strengthening and further improvement of trade links between Ukraine and the Tyumen Region. The Governor also suggested that

Ukraine should transfer title to a building in Kyiv to the future company, so that it could be used as its head office.

6. In September 1995 the applicant company was founded by six companies, including the Ukrresursy State Enterprise.

7. On 20 August 1996 the applicant's articles of association were amended, the number of co-founders having increased to seven entities, including the Ukrresursy State Enterprise and the State Property Fund of Ukraine ("the Fund"). The Fund was stated to be acting on behalf of the Ukranaftoprodukt State Enterprise ("Ukranaftoprodukt"). Each founder was declared to hold 14.28% of the applicant's share capital. While six companies were to pay equal amounts of money for their shares (USD 71,542¹), the Fund undertook to transfer to the applicant company a title to the building valued at USD 71,542², and belonging, as was stated in the articles of association, to Ukranaftoprodukt.

8. On 30 August 1996 Ukranaftoprodukt, acting on the Fund's instructions, transferred title to an administrative building in Kyiv to the applicant. Ukranaftoprodukt continued to use the building as its premises.

9. According to the applicant's amended articles of association, it was established mainly for the purposes of obtaining profit for the shareholders and for the creation of an infrastructure for the cooperation between Ukrainian and Tyumen companies pursuant to intergovernmental decisions aiming at improving effectiveness of business links and implementation of joint programmes, such as the sale of oil, gas, wood, agricultural products; legal advice; organisation of exhibitions; other commercial activities necessary for achieving the goals of the company. The applicant company enjoyed all the rights of a separate legal entity. The applicant's shareholders were entitled to take part in its management, to receive a part of its profit, to be informed about its activities etc. The property of the applicant company consisted of the objects and money transferred to its share capital by the shareholders, as well as the funds received by the applicant from other sources. The shareholders did not enjoy separate rights over the objects transferred to the applicant as their contributions.

10. In October 1998 the Kyiv City State Administration ("the City Administration") instituted proceedings in the Higher Arbitration Court of Ukraine against the Fund, Ukranaftoprodukt and the applicant company, seeking recovery of title to the building, claiming that it owned the building and alleging that the title to the latter had been transferred to the applicant *ultra vires*.

11. On 29 December 1998 the court invalidated the transfer of 30 August 1996 and ordered Ukranaftoprodukt to give the building back to the City Administration. The court found that that the building belonged to

1. Around 61,310 euros – "EUR".

2. Around EUR 61,310.

the Kyiv City Administration and that the Ukrnaftoprodukt had not been entitled to transfer it to the applicant.

12. Ukranaftoprodukt lodged a request for review of the decision of 29 December 1998 with the panel of the Higher Arbitration Court for the review of judgments, rulings and resolutions (the “Review Panel”).

13. On 11 March 1999 the Review Panel quashed the judgment of 29 December 1998 and rejected the claim of the City Administration. The panel held that the claim had been lodged out of time and that there was no evidence that the City Administration was the lawful owner of the building.

14. On 24 March 2000 the Presidium of the Higher Arbitration Court rejected the request for supervisory review (the “*protest*”) of the resolution of 11 March 1999, lodged by the President of that court, as unsubstantiated.

15. On 24 January 2001 the Prosecutor General of Ukraine, following the City Administration's request, lodged a *protest* with the Plenary Higher Arbitration Court (the “Plenary Court”), seeking supervisory review proceedings in the case. On 15 February 2001 the Plenary Court, in the presence of the representatives of the General Prosecutor's office, allowed the *protest*, quashed the resolutions of 11 March 1999 and 24 March 2000, and upheld the judgment of 29 December 1998. In its decision, the court summarised the Prosecutor General's arguments and found them substantiated. No other reasons were given for its decision. The parties were not invited to participate in the hearing before the Plenary Court. The applicant's comments on the *protest* of the Prosecutor General were not examined by the Plenary Court.

16. According to the applicant, on 2 November 2001 its articles of association were amended to the effect that the Ukrainian authorities were no longer a shareholder.

17. The Government contended that the State remained one of the founders of the applicant company and, hence, the owner of 28.56% of its share capital.

II. RELEVANT DOMESTIC LAW

A. Economic Associations (“Companies”) Act of 19 September 1991 (as worded at the material time)

18. The relevant provisions of the Act read as follows:

Article 12. Property of the company

“A company shall be the owner of:

[i] the property which its founders ... transferred to it;

[ii] the objects which it produced...;

[iii] the profit which it received...”

Article 13. Contributions of founders and participants of a company

“Participants and founders of a company may transfer to it as their contribution buildings ..., money ...

The contribution expressed in karbovatsi¹ shall constitute the founder's and participant's share in the [company's] statutory fund.”

B. Arbitration Courts Act of 4 June 1991 (repealed as of 1 June 2002)

19. The relevant provisions of the Act read as follows:

Article 1. Administration of justice in economic cases

“In accordance with the Constitution of Ukraine, the arbitration courts shall have jurisdiction over economic cases.

The arbitration court is an independent body with jurisdiction over all economic disputes between entities, public and other bodies, and over litigation arising out of insolvency.”

Article 11. Composition of the Higher Arbitration Court of Ukraine

“The Higher Arbitration Court shall be composed of the President, the First Deputy President, the President's deputies, and the judges and [it] shall sit as:

the Plenary Higher Arbitration Court;

the Presidium of the Higher Arbitration Court;

the panels for the consideration of disputes and for the review of judgments, rulings, resolutions.”

C. Code of Arbitration Procedure of 6 November 1991 (before the changes introduced on 21 June 2001)

20. The relevant provisions of the Code of Arbitration Procedure provided:

1. The former transitional currency of Ukraine before September 1996.

Article 14. Jurisdiction of the Higher Arbitration Court

“The Higher Arbitration Court shall consider cases:

1) in which one of the parties is ... the Kyiv City State Administration...”

Article 91. Grounds for supervisory review of a judgment, ruling or resolution

“The lawfulness and reasoning of a judgment, ruling or resolution of an arbitration tribunal ... may be reviewed under the supervisory procedure upon the party's request or following a *protest* by a prosecutor or his deputy, in accordance with this Code and other laws of Ukraine.

The party's request for review of a judgment ... shall be examined by ... the panel of the Higher Arbitration Court for the review of judgments, rulings and resolutions.

The following persons are empowered to lodge a *protest*:

The Prosecutor General and his deputies...”

Article 92. Arbitration court's right to review the lawfulness of a judgment, ruling, resolution under the supervisory procedure on its own initiative

“The arbitration court shall be entitled to review under the supervisory procedure the lawfulness and reasoning of a judgment, ruling, resolution on its own initiative...”

Article 95. Powers of the panel of the Higher Arbitration Court on supervisory review of a judgment, ruling, resolution

“... The panel ... shall review under the supervisory procedure:

1) a judgment and ruling concerning a dispute which was adjudicated by the Higher Arbitration Court...”

Article 96. Supervisory review of a judgment, ruling, resolution by the panel of the Higher Arbitration Court

“A judgment, ruling, resolution shall be reviewed by a panel of the President of the Higher Arbitration Court or his deputy and a judge of the Higher Arbitration Court. If they do not agree on the outcome of the review, the President of the Higher Arbitration Court or his deputy may report to the Presidium of the Higher Arbitration Court who decides the matter...”

A judgment, ruling, resolution shall be reviewed by the President of the Higher Arbitration Court or his deputy and two judges of the panel, if the application of law or assessment of evidence in the case is difficult. In such a case, the decision shall be adopted by a majority of votes.

A judgment or ruling delivered by the Deputy President of the Higher Arbitration Court or delivered in the hearing in which he presided shall be reviewed by the

President of the Higher Arbitration Court and two judges of the panel. In such a case, the resolution shall be adopted by a majority of votes.

A judgment or ruling delivered by the President of the Higher Arbitration Court or in the hearing in which he presided shall be reviewed by the Presidium of the Higher Arbitration Court.

If necessary, the parties may be invited to give their explanations at the panel's hearing.”

Article 97. Right to lodge with the Presidium of the Higher Arbitration Court a request for supervisory review

“The President of the Higher Arbitration Court, the Prosecutor General of Ukraine or his deputies have a right to lodge with the Presidium of the Higher Arbitration Court a *protest* against the resolution delivered by the panel of the Higher Arbitration Court for economic disputes.

A party to the proceedings has a right to lodge with the Presidium of the Higher Arbitration Court an application for supervisory review of the judgment or ruling delivered by the President of the Higher Arbitration Court in the hearing in which he presided...”

Article 99. Right to lodge with the Plenary Higher Arbitration Court a request for supervisory review of the resolution of the Presidium of the Higher Arbitration Court concerning an economic dispute

“The President of the Higher Arbitration Court, the Prosecutor General of Ukraine have a right to lodge with the Plenary Higher Arbitration Court a *protest* against the resolution delivered by the Presidium of the Higher Arbitration Court.

Following its deliberations, the Plenary Higher Arbitration Court shall adopt a resolution...”

Article 100. Lodging of an application for supervisory review of a judgment, ruling, resolution, and [lodging of] a *protest* by a prosecutor or his deputy

“An application for supervisory review ... shall be lodged with the arbitration court which adjudicated the case. If the supervisory review is to be carried out by the Higher Arbitration Court, the application, together with the case-file, shall be submitted by the relevant arbitration court to the Higher Arbitration Court within five days following the receipt of the application.

The *protest* ... shall be lodged with the arbitration court competent to review the judgment...

Copies of the application or *protest* shall be sent to the parties...

The enforcement proceedings shall not be suspended if an application or a *protest* is lodged, save in the cases where the judgment ... concerns the transfer of money and the forced taking of property...”

Article 102. Deadline for lodging of an application for supervisory review of a judgment, ruling, resolution, and [for lodging of] a *protest* by a prosecutor

“An application ... and a *protest* must be lodged within two months of the date of the judgment...”

Article 103. Observations in reply to an application for supervisory review of a judgment, ruling, resolution, and [in reply to] a *protest* of a prosecutor

“Upon the receipt of a copy of the application for supervisory review ... or of a *protest*, a party shall send to the arbitration court, other parties ... [its] observations [in reply].

...

The absence of the [parties'] observations ... shall not prevent [a court] from carrying out the review.”

Article 104. Information about the date and time of the supervisory review of a judgment, ruling, resolution. Time-limits of the review [procedure].

“The parties may participate in [the proceedings on] the review... The prosecutor ... shall take part in [the proceedings on] the review, which were initiated upon [his] *protest*. The non-appearance of the parties or the prosecutor ... shall not prevent [the court] from carrying out the review...”

The supervisory review ... shall be completed within two months of the receipt of an application or *protest*...

A judgment, ruling, resolution of the arbitration court may be reviewed under the supervisory procedure no later than within one year after their delivery.”

Article 106. Powers of the arbitration court, reviewing a judgment, ruling, resolution

“... [T]he arbitration court has power:

[i] to leave a judgment, ruling, resolution without changes;

[ii] to change a judgment, ruling, resolution;

[iii] to quash a judgment, ruling, resolution, and to adopt a new judgment, remit a case for a fresh consideration, discontinue the proceedings, or leave a case without consideration.

A judgment, ruling, resolution ... shall be reviewed as a whole, irrespective of the grounds for an application for supervisory review or a *protest*.

An arbitration court reviewing a judgment, ruling, resolution under the supervisory procedure shall have all the powers of an arbitration court considering an economic dispute.

The supervisory review of a judgment, ruling, resolution by the Higher Arbitration Court shall be final, save when a party is outside the territory of Ukraine and there is an agreement between the relevant States for a different procedure of review.”

Article 106. Grounds for changing or quashing of a judgment, ruling, resolution

“...

- 1) incomplete examination of the circumstances relevant to a case;
- 2) lack of proof of the relevant circumstances established by a court;
- 3) lack of conformity of the conclusions [of a court] ... with the circumstances of a case;
- 4) violation or incorrect application of substantive or procedural law...”

Article 115. Finality of a judgment, ruling, resolution and their binding force

“A judgment, ruling, resolution of an arbitration court shall be final and binding on the day of their delivery...”

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. As to the *locus standi* of the applicant company

21. The Government submitted that the applicant company did not have the capacity to apply to the Court under Article 34 of the Convention, since the State held 28.56% of its share capital through the Ukrresursy State Enterprise and the State Property Fund. The Government also stated that the applicant company had been established pursuant to an agreement between the Ukrainian and Russian high governmental officials in order to create an infrastructure for the cooperation between the Ukrainian and Tyumen companies and to implement the intergovernmental decisions aiming at improving effectiveness of the cooperation between the businesses of two countries. Thus, the applicant had to be classified, for the purposes of Article 34 of the Convention, as a governmental organisation. The Government further argued that in the case *Kosarevskaya and Others v. Ukraine* (nos. 29459/03, 4935/04 and 26996/04, 6 December 2005) the Court had found the State responsible for the debts of the company, in

which it had held 32.67% of the share capital. The Government suggested that the same approach should be taken in the present case, as moreover the dispute at hand had concerned a building which belonged to the State.

22. The applicant company disagreed, stating that according to Ukrainian law it was a private company, whose aim was to receive profit through business operations and to divide it among its shareholders. The applicant submitted that it acted according to its articles of association which were of an ordinary private-law nature, that the State's share did not allow it to control the applicant, and that it did not perform any public-law functions. The mere fact that originally there were two State entities among its founders could not deprive the applicant of its right to have recourse to the Court under Article 34 of the Convention.

23. In its further submissions, the applicant stated that as of 2 November 2001 none of its shares belonged to the State.

24. In reply, the Government contended that the State remained one of the founders of the applicant company and, consequently, the owner of 28.56% of its share capital.

25. The Court observes that whilst it is not contested that one of the original founders of the applicant company was a State Enterprise, and that the State was also responsible for the State Property Fund, which became a co-founder of the company in August 1996, it is not clear from the parties' submissions whether the State retained a share in the applicant company from 2 November 2001 onwards. Nonetheless, the Court does not find it necessary to determine that particular issue, as in any event it considers that the applicant company has standing before the Court for the following reasons.

26. The Court recalls that a legal entity "claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention and the Protocols thereto" may submit an application to it, provided that it is a "non-governmental organisation" within the meaning of Article 34 of the Convention. The term "governmental organisation", as opposed to "non-governmental organisation", includes legal entities which participate in the exercise of governmental powers or run a public service under Government control (see *Radio France and Others v. France* (dec.), no. 53984/00, ECHR 2003-X). When determining whether a particular entity falls into one of the abovementioned categories, the Court has regard to its legal status, the nature of the activity it carries out, the context in which it is carried out, and the degree of the entity's independence from the political authorities.

27. The Court observes that according to Ukrainian law and its articles of association the applicant company enjoys institutional autonomy; it is governed by company law and it is under the control and management of its founders (see paragraphs 9 and 18 above). Even assuming that the State still owns around a third of the applicant's share capital, no evidence has been

submitted which could indicate that the State is entitled to a greater role in managing the company than the other shareholders. Moreover, there is nothing in the case-file to suggest that the applicant company carried out activities other than those which could be classified as business, irrespective of the fact that some provisions of its articles of association could be construed as to entrust the applicant with a public-service mission, namely to implement “intergovernmental decisions” in the field of business cooperation.

28. The Court accordingly concludes that the applicant company is a “non-governmental organisation” within the meaning of Article 34 of the Convention and that the Government's objection should be dismissed.

B. As to the compliance with the six-month rule

29. The Government pleaded non-compliance with the six-month rule. They stated that the final decision in the applicant's case, within the meaning of Article 35 § 1 of the Convention, was given by the Higher Arbitration Court on 29 December 1998, i.e. more than six months before the application was lodged with the Court. The Government maintained that the subsequent review of this decision could not be taken into account as it was effected in the course of the extraordinary procedure. The applicant disagreed.

30. The Court notes that on 11 March 1999 the Review Panel overruled the judgment of 29 December 1998 and adopted a resolution favourable to the applicant. The latter resolution was subsequently quashed by the Plenary Court on 15 February 2001, which also reviewed the case on the merits and upheld the judgment of 29 December 1998. The applicant's complaints are essentially directed against the resolution of the Plenary Court, which was delivered less than six months before the applicant company lodged the present application with the Court (23 July 2001). The Government have failed to advance any argument as to why the Court should disregard that decision (see, *mutatis mutandis*, *Tregubenko v. Ukraine* (dec.), no. 61333/00, 21 October 2003). Accordingly, the Court is not prevented by the six-month rule from considering the application.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

31. The applicant company complained about the quashing of the resolution of the Review Panel of 11 March 1999, stating that the latter had been the final and binding decision given in its favour. It alleged that the procedure before the Plenary Court had been incompatible with the principles of legal certainty, equality of arms and a public hearing. The applicant invoked Article 6 § 1 of the Convention which provides, in so far as relevant, as follows:

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

A. Admissibility

32. The Court finds that in the absence of the parties' comments on the admissibility of the applicant's complaints under Article 6 § 1 of the Convention, apart from those discussed above (see paragraphs 21-30 above), these complaints raise issues of fact and law under the Convention, the determination of which requires an examination of the merits. It discerns no ground for declaring them inadmissible.

B. Merits

33. In their observations on the merits of this part of the application, the Government stated that the applicant's rights under Article 6 § 1 of the Convention had not been infringed. In particular, they argued that the Prosecutor General had acted on behalf of one of the parties to the impugned proceedings, the Kyiv State Administration, when he had lodged a *protest* with the Plenary Court. His intervention to the proceedings was in the interests of the State and, thus, lawful.

34. The Government further argued that the applicant, which had first benefited from the extraordinary review of the judgment favourable to another party to the proceedings (see paragraph 13 above), was not entitled to bring into question the compliance of the same procedure, as a result of which it had finally lost the case, with the Convention. The Government referred to the “clean hands” doctrine in international law, according to which the responsibility of a State is not engaged when the complainant himself has acted in breach of the law, international or domestic.

35. The applicant disagreed, stating that the review of its case by the Review Panel had been a part of the ordinary court procedure for the purposes of Article 6 § 1 of the Convention and had not contravened the principle of legal certainty. In contrast, the review of its case by the Plenary Court was an extraordinary procedure which contravened Article 6 § 1 of the Convention.

36. The Court recalls that in its decision concerning the admissibility of an application involving similar issues, it found that the procedure of supervisory review of a first instance court's judgment by the Review Panel, which existed before changes had been introduced to the Code of Arbitration Procedure on 21 June 2001, did not run counter the principle of legal certainty and that the applicant's recourse to that procedure had been necessary for the purposes of exhaustion of domestic remedies under Article 35 § 1 of the Convention (see *Sovtransavto Holding v. Ukraine* (dec.), no. 48553/99, 27 September 2001). In that case, the Court noted that

this procedure had been directly available to each party to the case and that it had not depended on the discretionary power of a State authority.

37. The Court finds no ground to depart from the conclusions it reached, in a different context, in the *Sovtransavto* case. It also notes that according to Articles 97, 100, 102-104 of the Code of Arbitration Procedure, as worded at the material time, the first instance arbitration court's judgment could not be challenged before the Review Panel indefinitely, but within a period prescribed by law, namely, within two months following the adoption of the first instance court's judgment; that the relevant procedural rules provided for the communication of a party's or prosecutor's request for review to another party and the latter's right to submit its comments in reply; and that the Review Panel could reconsider the first instance court's judgment only within a year from the date of its adoption (see paragraph 20 above). Accordingly, the Court finds that the resolution of the Review Panel of 11 March 1999 was the "final decision" in the case, within the meaning of Article 35 § 1 of the Convention, and the Court rejects the Government's submission that the applicant company's application to the Review Panel disqualified it from complaining about subsequent events.

38. The procedure of review of the case by the Plenary Court, however, was distinct from that by the Review Panel. In particular, under Article 99 of the Code of Arbitration Procedure it was only the President of the Higher Arbitration Court and the Prosecutor General who had power to introduce a request for supervisory review of the case by the Plenary Court (see paragraph 20 above). The exercise of those powers was not subject to any time-limit and there was no obligation on the Plenary Court to consult the parties before deciding on the submissions of the President of the Higher Arbitration Court or the Prosecutor General.

39. The Court has already found in similar cases before it that the supervisory review of final and binding judgments, which was not directly accessible to parties, nor subject to any time-limit, nor justified by substantial and compelling circumstances, was not compatible with the principle of legal certainty that is one of the fundamental aspects of the rule of law for the purposes of Article 6 § 1 of the Convention (see, for instance, *Ryabykh v. Russia*, no. 52854/99, § 52-58, ECHR 2003-IX, *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 77, ECHR 2002-VII, and *Agrotehservis v. Ukraine*, no. 62608/00, §§ 42-43, 5 July 2005).

40. In the absence of any special factors which could justify the use of a supervisory review in the applicant's case, the fact that the latter procedure was used to set aside the resolution of the Review Panel of 11 March 1999, given in the applicant's favour, is sufficient to enable the Court to rule that its "right to a court" under Article 6 § 1 of the Convention was infringed.

41. The Court does not find it necessary to consider separately whether the procedural guarantees of Article 6 § 1 of the Convention, in particular, equality of arms and public hearing, were respected during the proceedings before the Plenary Court.

42. There has accordingly been a violation of that Article.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

43. The applicant company further complained under Article 1 of Protocol No. 1 that it had been unlawfully deprived of its possessions as a result of the quashing of the decision of the Review Panel of 11 March 1999. Article 1 of Protocol No. 1 reads as follows:

“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.”

44. The applicant company submitted that it had been deprived of its building unlawfully, alleging that such deprivation had been based on the resolution of the Plenary Court of 15 February 2001 which had contravened the principle of rule of law. It further submitted that there had been no public interest which could have justified the deprivation of its possessions.

45. The Government did not contest that the impugned building had been the applicant's property for the purposes of Article 1 of Protocol No. 1 at a time when the domestic courts had ruled otherwise. They argued that the applicant had been deprived of that property lawfully and in the public interest. In particular, such deprivation was envisaged by the final judgment and was necessary to ensure the observance of the right of the Kyiv community to enjoy its municipal property.

A. Admissibility

46. The Court notes that in the absence of the parties' comments on the admissibility of this part of the application, other than those discussed above (see paragraphs 21-30 above), it is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *Whether there was an interference with the right of property*

47. Article 1 of Protocol No. 1 comprises three distinct rules: “the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, among other things, to control the use of property in accordance with the general interest ... The three rules are not, however, ‘distinct’ in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule” (see, for instance, *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 78, ECHR 2005-...).

48. The Court notes that it is not disputed that the applicant company suffered an interference with its right of property which amounted to a “deprivation” of possessions within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1. The Court must therefore examine whether the interference was justified under that provision.

2. *Justification for the interference with the right of property*

a. “Provided for by law”

49. The Court reiterates that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph authorises a deprivation of possessions only “subject to the conditions provided for by law” and the second paragraph recognises that the States have the right to control the use of property by enforcing “laws”. Moreover, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see *Amuur v. France*, judgment of 25 June 1996, *Reports of Judgments and Decisions* 1996-III, pp. 850-51, § 50; *Former King of Greece and Others v. Greece* [GC], no. 25701/94, § 79, ECHR 2000-XII; and *Malama v. Greece*, no. 43622/98, § 43, ECHR 2001-II).

50. The Government argued that the interference had been lawful, since it had been sanctioned by the court's final decision, while, according to the applicant, that decision had been delivered in violation of the principle of

legal certainty and, thus, it could not have served as a legitimate ground for the interference with the applicant's right to property.

51. Although the Court is generally not entitled to call into question the decisions reached by the domestic courts and tribunals, it notes that the principle of lawfulness requires the State to afford judicial procedures that offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly any disputes between private persons (see *Sovtransavto*, cited above, § 96).

52. However, not every procedural shortcoming in a case will take an interference with the right to possessions outside the scope of the “principle of lawfulness”. In the present circumstances, the Court is not required to take a position on this issue as the deprivation of possessions was in any event not compatible with Article 1 of Protocol No. 1 for the reasons set out below.

b. “In the public interest”

53. The Court notes that the resolution of the Plenary Higher Arbitration Court, by which the applicant company was deprived of the building, was based on formal grounds, namely, that a State authority, the State Property Fund, had transferred the building to the applicant *ultra vires*, since it belonged to a local authority.

54. The Court considers that the doctrine of *ultra vires* provides an important safeguard against errors by the authorities acting beyond the competence given to them under domestic law. The Court does not dispute the purpose or usefulness of this doctrine which indeed reflects the notion of the rule of law underlying much of the Convention itself (see *Stretch v. the United Kingdom*, no. 44277/98, § 38, 24 June 2003). Thus, notwithstanding the applicant company's submissions to the contrary, the Court is of the view that the taking of the applicant's property by application of the doctrine of *ultra vires* was capable of serving the public interest. The Court however must also verify whether the principle of proportionality was respected in this case.

c. Proportionality of the interference

55. The Court reiterates that an interference with the peaceful enjoyment of possessions must strike a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see, among other authorities, *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, p. 26, § 69). The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole, including therefore the second sentence, which is to be read in the light of the general principle enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be

realised by any measure depriving a person of his possessions (see *Pressos Compania Naviera S.A. and Others v. Belgium*, judgment of 20 November 1995, Series A no. 332, p. 23, § 38).

56. In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing how the measures are to be implemented and to ascertaining whether the consequences of implementation are justified in the general interest for the purpose of achieving the object of the law in question. Nevertheless, the Court cannot fail to exercise its power of review and must determine whether the requisite balance was maintained in a manner consonant with the applicant's right to "the peaceful enjoyment of [its] possessions", within the meaning of the first sentence of Article 1 of Protocol No. 1 (see *Zvolský and Zvolská v. the Czech Republic*, no. 46129/99, § 69, ECHR 2002-IX).

57. Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants. In this connection, the Court has already found that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances (see *Holy Monasteries (The) v. Greece*, judgment of 9 December 1994, Series A no. 301-A, p. 35, § 71; *Former King of Greece*, cited above, § 89; and *Zvolský and Zvolská*, cited above, § 70).

58. Turning to the circumstances of the present case, the Court notes that the applicant company acquired the building as consideration for its shares in good faith, without knowing that the State Property Fund had no power to transfer it, and it has not been suggested that it should have known. Even though Ukranaftoprodukt continued to use the building, it formed part of the assets of the applicant company in the same way as any other asset, and the company had, at the very least, a legitimate expectation that it would be able to use the building as part of its commercial operations.

59. The effect of the decision to quash the transfer of the building from Ukranaftoprodukt to the applicant company was thus to deprive the latter of part of its initial capital, and hence of part of its assets. There has been no suggestion that that it was open to the applicant company to seek any form of compensation to make up for that loss.

60. The Court discerns no exceptional circumstances capable of justifying the absence of compensation in the present case and finds that the applicant company has thus had to bear an individual and excessive burden which has upset the fair balance that should be maintained between the demands of the public interest on the one hand and protection of the right to the peaceful enjoyment of possessions on the other.

61. There has therefore been a violation of Article 1 of Protocol No. 1.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

62. 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

63. The applicant company submitted that it suffered some pecuniary and non-pecuniary damage because of the violation of its Article 6 and Article 1 of Protocol No. 1 rights. However, it did not specify the amount of its claim. It further sought the return of the building, of which it had been deprived, as a part of compensation for the pecuniary damage it had suffered.

64. The Government maintained that the applicant's claims had been unsubstantiated and had to be rejected in their entirety.

65. The Court notes that the applicant's claim for non-pecuniary damage is unspecified and, therefore, rejects it as unsubstantiated.

66. The Court further considers that the question of the application of Article 41 in respect of the applicant's claim for pecuniary damage is not ready for decision. It is therefore necessary to reserve the matter, due regard being had to the possibility of an agreement between the respondent Government and the applicant company (Rule 75 § 1 of the Rules of Court).

B. Costs and expenses

67. The applicant company did not specify its claim under this head. The Court therefore makes no award.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
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* that the question of the application of Article 41 is not ready for decision in so far as the applicant has claimed pecuniary damage and accordingly,
- (a) *reserves* the said question;
 - (b) *invites* the Government and the applicant to submit, within six months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
 - (c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 November 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK
Registrar

Peer LORENZEN
President