

AS TO THE ADMISSIBILITY OF

Application No. 22045/93  
by Kostas BEIS  
against Greece

The European Commission of Human Rights (First Chamber) sitting in private on 11 January 1995, the following members being present:

Mrs. J. LIDDY, Acting President  
MM. C.L. ROZAKIS  
F. ERMACORA  
E. BUSUTIL  
A.S. GÖZÜBÜYÜK  
A. WEITZEL  
M.P. PELLONPÄÄ  
B. MARXER  
B. CONFORTI  
N. BRATZA  
I. BÉKÉS  
E. KONSTANTINOV  
G. RESS

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 18 March 1993 by Kostas BEIS against Greece and registered on 11 June 1993 under file No. 22045/93;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;
- the observations submitted by the respondent Government on 22 June 1994 and the observations in reply submitted by the applicant on 20 July 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Greek citizen, born in 1933 and resident of Athens. He is a professor of civil procedural law at the University of Athens.

The facts of the case, as they have been submitted by the parties, may be summarised as follows:

1. The particular circumstances of the case

In March 1992 the head of the legal service of the Technical Chamber of Greece (Tehniko Epimelitireio Ellados - hereafter TEE), a legal entity of public law enjoying all the privileges and immunities of the State, entrusted the applicant with the drafting of two expert's opinions concerning proceedings brought against the TEE by Messrs. P and S. It was agreed that the applicant would receive a fee of GDR

7.500.000.

The applicant submitted his opinions on 22 April 1992. However, the fee agreed was not paid. According to the applicant, the deputy (paredros) of the Audit Court (Elegtiko Sinedrio) did not approve the payment on the ground that the opinions could have been drafted by the legal staff of the TEE.

On 4 May 1992 the Committee of Management of the TEE set up a seven-member expert committee which would have advised the TEE on a number of issues against a fee of GDR 10.500.000. The applicant was one of the members of this committee and one of the issues the committee would have provided advice on was the actions brought against the TEE by P and S.

On 8 May 1992 five of the members of the committee notified the legal service of the TEE that the committee had agreed to delegate to the applicant the task of advising the TEE on the proceedings brought against it by P and S. The applicant would receive GDR 7.500.000 out of the total sum offered by the TEE to the committee. The remaining issues in the committee's mandate would be dealt with by the other members of the committee, who would receive the remaining GDR 3.000.000.

On 12 June 1992 the TEE acknowledged receipt of two expert opinions drafted by the applicant concerning the proceedings brought by P and S against the TEE.

On 9 July 1992 the Committee of Management of the TEE decided to pay the applicant GDR 7.500.000. On 29 July 1992, however, the Audit Court commissioner (epitropos) refused to authorise the payment, on the ground that the establishment of the expert committee had been unnecessary and therefore illegal. The TEE disagreed with the commissioner's opinion and on 16 September 1992 the case was referred to one of the Chambers of the Audit Court.

On 5 October 1992 the applicant lodged with the judge of the Court of First Instance (Monomeles Protodikeio) of Athens an application for an order for payment (diatagi pliromis) against the TEE, by which he sought recovery of the agreed remuneration for the two expert opinions he had submitted. His application was granted on 12 October 1992 (order of payment No. 12207/92).

On 21 October 1992 the applicant served the order on the TEE together with formal notice to pay. However, no payment was made. The order was served again on 11 November 1992, after the expiration of the time limit in which the TEE could have filed an opposition (anakopi).

On 24 November 1992 the First Chamber of the Audit Court confirmed that no payment should be made. The Court considered that, although the setting up of the committee was legal, the relevant rules did not provide for the delegation of part of the committee's responsibilities to one of its members.

On 3 December 1992, after the payment order had acquired force of res judicata, the applicant submitted to the Bank of Greece a formal request for compulsory seizure of the deposited TEE's assets.

In the meantime the TEE indicated once more its wish to satisfy the applicant on the basis of the order of payment. On 12 February 1993, however, the competent Commissioner of the Court of Auditors refused to authorise the payment relying on a decision of the Plenary of the Court of 6 March 1985 to the effect that the res judicata force of the orders for payment being limited, they cannot be assimilated to a final court decision and, as a result, they do not bind the Court of Auditors.

2. Relevant domestic law and practice

A. The procedure for issuing an order for payment is set forth in Articles 623 to 634 of the Code of Civil Procedure.

Article 623 provides:

"A person may apply for an order for payment, under the special procedure of Articles 624 to 634, in respect of claims to specific sums of money ..... the existence of which is proven by deed done by a public authority or privately".

Article 625 provides:

"The justice of the peace (eirinodikis) is competent to issue orders for payment in respect of claims otherwise coming within his jurisdiction. The judge of the court of first instance is competent to issue orders for payment in all other cases. No hearing is held on the application for an order for payment".

Article 627 provides:

"The judge decides on the application as soon as possible, without notifying the debtor ...."

Article 629 provides:

"The judge grants the application if it is well founded in law and in fact, orders the debtor to pay the sum due as well as the court costs ....."

Article 631 provides:

"An order for payment is a title which can be executed".

Article 632 para. 1 provides:

"The debtor against whom an order has been issued has the right to lodge an opposition within fifteen days from its notification. The opposition is lodged with the court which is competent *ratione materiae* to hear the case ....."

Article 633 para. 2 provides:

"If no opposition is lodged within the time-limit provided by law, the person in favour of whom the order has been issued may notify the debtor once again. The latter has the right to lodge an opposition within a period of fifteen days from notification ..... If no opposition is lodged, the order for payment acquires force of *res judicata* ....."

B. The privileges of the TEE are governed by law 2097/52 and the presidential decree of 27.11/14.12.1926.

Article 8 para. 1 of law 2097/52 provides:

"Court decisions ordering the payment of sums of money or court costs cannot be enforced against the State ....."

Article 41 of the presidential decree of 27.11/14.12.1926 provides:

"The TEE enjoys all the privileges of the State ....."

C. The procedure for seizing assets found in the possession of a

third person is governed by Articles 982 to 991 of the Code of Civil Procedure.

Article 985 paras. 1 and 3 provide:

"Within eight days from notification the third person must declare whether he is in possession of the claim or good seized .....

When the third person does not make the above-mentioned declaration, he is deemed to have made a negative declaration. If no declaration is made or if the declaration is inaccurate, the third person must compensate the person who has attempted to seize the asset".

Article 986 provides:

"Within thirty days from the date of the declaration of Article 985, the person who has attempted to seize the asset has the right to lodge an opposition .... He may simultaneously ask for compensation under Article 985 para. 3".

## COMPLAINTS

1. The applicant argues that, as a result of the non-execution of a payment order, he has been deprived of the only effective means of obliging the TEE to pay his remuneration. As a result, his right to peaceful enjoyment of his possessions, as guaranteed by Article 1 of Protocol No. 1, was violated.
2. The applicant complains that the impossibility of obtaining enforcement of the order against the TEE amounts to a violation of his right to have his civil rights and obligations effectively determined by a court in accordance with Articles 6 para. 1 and 13 of the Convention. He also complains that the Court of Auditors, which refuses to authorise the payment of the sum due, is not an Article 6 court.

## PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 18 March 1993 and registered on 11 June 1993.

On 2 March 1994 the Commission decided to communicate the application to the respondent Government and to request them to submit written observations on admissibility and merits.

The Government submitted their observations on 22 June 1994, after an extension of the time-limit fixed for this purpose, and the applicants' observations in reply were submitted on 20 July 1994.

## THE LAW

1. The applicant complains that, as a result of the non-execution of a payment order, he has been deprived of the only effective means of obliging the TEE to pay the remuneration due to him. As a result, his right to peaceful enjoyment of his possessions, as guaranteed by Article 1 of Protocol No. 1 (P1-1), was violated.

The Commission recalls that Article 1 of Protocol No. 1 (P1-1) lays down, with certain restrictions, that every natural or legal person is entitled to the peaceful enjoyment of his possessions.

The Government contend that the judge who issues an order for payment does not determine an Article 1 of Protocol No. 1 (P1-1) right, since he does not deliver justice. The order is not a court judgment

and is not pronounced pursuant to a judicial procedure with all the appropriate procedural guarantees. It has very limited consequences and does not create an irrebutable presumption that the claim exists and that the assessment of the judge is correct. The Court of Auditors, which is entrusted with the supervision of the legality of all public expenditure, cannot in such circumstances exercise its functions and authorise a public body to comply with an order of payment issued against it.

The existence, moreover, of a claim depends on the legality of the underlying contractual relationship. As a result, it cannot be concluded, on the basis of an order for payment, that a claim exists, when the competent organs of control, in casu the Court of Auditors, have not accepted the legality of this claim.

The Government further argue that an application for a payment order is not the only remedy by which one may obtain satisfaction under Greek law. Creditors can always lodge an ordinary civil action (agogi) for recovery. Final court judgments bind the Court of Auditors. If the applicant had instituted proceedings before the civil courts, he would have obtained satisfaction from the TEE. The latter was willing to pay and the Court of Auditors would have authorised the payment.

As regards the impossibility of obtaining enforcement against public bodies, the Government consider that the applicant has not exhausted domestic remedies in that he did not file an opposition against the failure of the Bank of Greece to react to his request for the seizure of the TEE's assets deposited with it. In any event, the Government argue that it is in the public interest not to allow enforcement against public bodies. Even if there was an interference with possessions, it would have been justified under Article 1 para. 2 of Protocol No. 1 (P1-1-2).

The applicant submits that an order for payment which has acquired force of *res judicata* is a full substitute for normal effective judicial protection. Before issuing the order, the judge will have to be satisfied that the application is well founded in law and in fact. The applicant admits that the order for payment in itself cannot be assimilated to a court judgment. However, the law grants the person against whom the order is made the right to lodge an opposition. Thereupon a court judgment is issued. If the applicant had tried to lodge civil proceedings, his action would have been rejected given the *res judicata* force of the order of payment. Alternatively, it would have been rejected for lack of legal interest, as he had already obtained a payment order.

The applicant further argues that the exercise by the Court of Auditors of its control powers cannot cancel property rights deriving from a contractual relationship between an individual acting in good faith and a public authority, especially when these rights have been recognised by a judge whose assessment has acquired *res judicata* force.

As regards, finally, the impossibility of obtaining enforcement against public bodies, the applicant considers that the remedy suggested by the Government is not effective. The Greek courts have constantly held that the rules providing for the privilege of public bodies are in accordance with the provisions of the Greek Constitution which guarantee the right of effective judicial protection. The applicant does not consider that the interference with his property rights is justified.

The Commission also recalls that, in accordance with its case-law, a claim can constitute a "possession", within the meaning of this provision, provided that it is sufficiently established (*Stran Refineries S.A. and Stratis Andreadis v. Greece*, Comm. Report 12.5.93, unpublished, para. 78, No. 7742/76, Dec. 4.7.78, D.R. 14 p. 146; No. 7775/77, Dec. 5.10.78, D.R. 15 p. 143).

It also notes that the Government have indicated a number of remedies which the applicant should have, in their view, exhausted before his application could be examined by the Commission. More in particular, they have argued that the applicant should have filed an opposition against the failure of the Bank of Greece to react to his request for the seizure of the TEE's assets deposited with it.

However, the Commission recalls that, in accordance with its constant case-law, if it cannot be shown that a remedy presents at least some minimal prospect of success, the individual is not required to pursue it (No. 8378/78, Dec. 14.5.80, D.R. 20 p. 168). It further notes that the applicant has argued that the Greek courts have always considered that the rules providing for the privilege of public bodies are in accordance with the provisions of the Greek Constitution which guarantee the right of effective judicial protection. The Government have not disputed the existence of such case-law. In these circumstances, the Commission considers that the applicant can be excused for not having pursued the remedy suggested by the Government.

The Commission further notes that the Government argue that the applicant should have instituted ordinary civil proceedings before the courts. In accordance with the Commission's constant case-law, an applicant who has exhausted a remedy which is apparently effective and sufficient cannot be required to try others which were available but probably ineffective (No. 11932/86, Dec. 9.5.88, D.R. 56 p. 199). The Commission considers that the main issue arising in this connection is whether an application for a payment order was an effective and sufficient remedy in the circumstances of the applicant's case.

This question is, however, related to the substance of the applicant's complaints under Article 1 of Protocol No. 1 (P1-1). These complaints raise serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. This part of the application cannot, therefore, be regarded as inadmissible within the meaning of Article 27 (Art. 27) of the Convention.

2. The applicant complains that the impossibility of obtaining enforcement of the order against the TEE amounts to a violation of his right to have his civil rights and obligations effectively determined by a court in accordance with Articles 6 para. 1 and 13 (Art. 6-1, 13) of the Convention. He refers in this connection to TEE's immunity from execution and to the fact that, in accordance with the case-law of the Greek courts, creditors are not allowed to seize assets of debtors which are deposited with banks. He also complains that the Court of Auditors, which refuses to authorise the payment of the sum due is not an Article 6 (Art. 6) court, as it is called upon to review its own actions.

The Commission recalls that Article 6 (Art. 6) of the Convention guarantees the right to a fair hearing in the determination of one's civil rights and obligations. Article 13 (Art. 13) of the Convention, moreover, guarantees everyone whose rights and freedoms as set forth in the Convention are violated an effective remedy before a national authority.

The Government consider it doubtful whether the applicant can invoke Article 6 (Art. 6) of the Convention, since the dispute which led to the issuing of the order of payment is neither real nor serious. The real basis of the applicant's contractual relationship with the TEE is the agreement of March 1992, which, however, did not form the subject matter of the dispute of which he complains. In any event, proceedings for an order for payment do not involve the determination of civil rights and the applicant has not exhausted domestic remedies since he never instituted ordinary civil proceedings. He also failed to lodge an opposition against the failure of the Bank of Greece to

react to his request for the confiscation of the TEE's assets deposited with it.

Insofar as the applicant's complaint under Article 13 (Art. 13) of the Convention is concerned, the Government further argue that the applicant could have asked the Court of Auditors to revoke the decisions it issued in his case.

The applicant considers that his civil rights have been determined in the proceedings for a payment order. The remedies suggested by the Government in this connection are not effective.

As regards the Government's submissions regarding the possibility of asking the Court of Auditors to revoke its decision, the applicant argues that his request would have no prospects of success, given the constant case-law of the Court of Auditors concerning the non-authorization of expenditure to comply with a payment order.

The Commission notes that the Government argue that the applicant should have lodged an opposition against the failure of the Bank of Greece to react to his request for the confiscation of the TEE's assets deposited with it. In the light, however, of the constant case-law of the Greek courts referred to above in connection with the applicant's complaint under Article 1 of Protocol No. 1 (P1-1), the Commission considers that this could not constitute an effective remedy.

The same is, moreover, true of the second remedy referred to by the Government, namely submitting a request to the Court of Auditors to revoke the decisions it issued in the applicant's case. In accordance with the constant case-law of the Court of Auditors to which the applicant refers and which is not disputed by the Government, the Court of Auditors does not consider itself bound by the *res judicata* effect of orders for payment. In this light, a request for reconsideration by the applicant would not have remedied in all likelihood the alleged violation.

The Commission further notes that the Government submit that the applicant should have instituted ordinary civil proceedings. In accordance, however, with the Commission's case-law, the applicant would be excused for not pursuing this remedy if the proceedings he had already instituted for the recovery of his fees, by applying for a payment order, were considered to be effective and sufficient in the circumstances of the applicant's case.

This question is, however, related to the substance of the applicant's complaints under Articles 6 and 13 (Art. 6, 13) of the Convention. These complaints raise serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. This part of the application cannot, therefore, be regarded as inadmissible within the meaning of Article 27 (Art. 27) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION ADMISSIBLE,  
without prejudging the merits of the case.

Secretary  
to the First Chamber

(M.F. BUQUICCHIO)

Acting President  
of the First Chamber

(J. LIDDY)