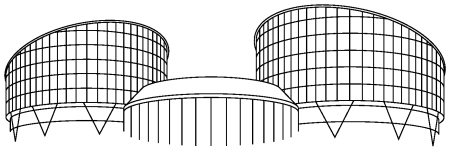

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF VENIAMIN TYMOSHENKO AND OTHERS v. UKRAINE

(Application no. 48408/12)

JUDGMENT

This version was rectified on 13 November 2014
under Rule 81 of the Rules of Court

STRASBOURG

2 October 2014

FINAL

02/01/2015

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Veniamin Tymoshenko and Others v. Ukraine,

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

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ganna Yudkivska,
Vincent A. De Gaetano,
André Potocki,
Aleš Pejchal, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 9 September 2014,

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

PROCEDURE

1. The case originated in an application (no. 48408/12) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by five Ukrainian nationals: Mr Veniamin Vyacheslavovych Tymoshenko (born in 1975), Andriy Mykolayovych Borodin (born in 1973), Olga Valeriyivna Ivanova (born in 1971), Oleg Petrovych Pushnyak (born in 1972) and Taras Oleksandrovych Tovstyy (born in 1984). Mr Borodin lives in Boryspil and all the other applicants live in Kyiv.

2. The applicants were represented by Ms O. Chugayenko and Ms O. Korobko, lawyers practising in Kyiv. The Ukrainian Government ("the Government") were represented, most recently, by their then Acting Agent, Ms O. Davydchuk.

3. The applicants complained that the ban on a strike by AeroSvit aircraft cabin crew members had been in breach of their rights under Article 11 of the Convention.

4. On 7 March 2013 the application was communicated to the Government.

5. Written submissions were received from the European Trade Union Confederation (ETUC), which had been granted leave by the President to intervene as a third party (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. At the material time the applicants were employed by the CJSC "AeroSvit Airlines" ("AeroSvit") as aircraft cabin crew.

7. As confirmed, in particular, by the minutes of the trade union's constituent assembly of 2 July 2003, all the applicants were members of the company's trade union. Mr Tymoshenko was its chairman.

8. On 16 February 2011 the National Mediation and Reconciliation Service ("the NMRS") registered a collective labour dispute between the employees and the management of AeroSvit. The employees' demands concerned, in particular, the following issues:

- repairs to the aircraft electronic catering and air-conditioning equipment;
- enhancing the safety of on-flight technical processes;
- salary payments to be made no later than three days before a period of leave;
- full and timely salary payments twice per month;
- a 3% pay rise and recalculation of salaries for 2009 and 2010;
- salary payment on the basis of the exchange rate of the US dollar and the Ukrainian hryvnia as established by the National Bank of Ukraine, with salaries to be recalculated from 2008;
- recalculation of long-service bonuses;
- ensuring transportation of aircraft cabin crew to and from the airport;
- establishing a USD 50 *per diem* allowance for all foreign flights;
- uniform cleaning and ironing to be at the employer's expense;
- allocation of at least 0.3% of the salary budget for cultural and sporting events;
- awarding employees a bonus of 3.23% from the 2008 profits; and
- inflation adjustment of salaries if payment was delayed, with effect from December 2008.

9. On 16 March and 12 April 2011 the NMRS deregistered some of the employees' demands, noting that they had been resolved, with reference to decisions of the reconciliation commissions of 28 February, 10 and 30 March 2011.

10. On 27 May 2011 the NMRS Labour Arbitration Court delivered its decision on the employees' remaining demands, following a hearing in which representatives of both parties participated. It found most of the demands to be legitimate and directed the employer to comply with them.

11. In the absence of any compliance measures, AeroSvit cabin crew, including the applicants, decided to embark on industrial action.

12. On 9 September 2011 the general meeting of AeroSvit employees, seeking resolution of the labour dispute, announced a strike of 150 aircraft

cabin crew members. The strike was due to start on 28 September 2011 and continue until the employees' demands were fully met. The announcement specified that all foreign flights which began prior to the beginning of the strike would be completed. The meeting appointed a strike committee of six persons (including all of the applicants except Mr Pushnyak, who, however, attended the meeting and voted in favour of the strike). The committee was vested with the following powers: to conduct negotiations on behalf of the employees with the company's management and State authorities; to draw attention to the strike in the mass media; to receive information from the company's management on compliance with the employees' requirements; to initiate and participate in a reconciliation commission; to organise and conduct meetings and pickets in support of the demands put forward; to sign agreements with the owner or an authorised representative on resolution of the labour dispute; and to consult the NMRS.

13. By 12 September 2011 the strike committee had notified the following authorities about the decision to hold a strike: the employer, the NMRS, the Infrastructure Ministry, the State Aviation Administration, the Social Policy Ministry, the State Labour Inspection, the Parliamentary Ombudsman, as well as a number of other institutions and organisations.

14. On 19 September 2011 the management of AeroSvit lodged a claim with the Darnytskyy District Court of Kyiv ("the Darnytskyy Court") against the flight attendants' trade union, seeking to have the strike declared unlawful.

15. On 26 September 2011 the Darnytskyy Court held the first hearing on the case. Another hearing was scheduled for the morning of 28 September 2011.

16. The planned hearing did not take place for reasons unknown to the applicants. They later discovered that the judge had been on sick leave.

17. On 28 September 2011 the management of AeroSvit Airlines brought another claim, this time before the Boryspil City Court ("the Boryspil Court") and against the strike committee, seeking to have the strike declared unlawful.

18. On 29 September 2011 the Boryspil Court, in written proceedings, issued an injunction prohibiting the strike committee from holding the strike pending adjudication of the employer's claim.

19. On the same day AeroSvit's management handed over a copy of the injunction to the trade union's representatives.

20. On 30 September 2011 the company's management withdrew its earlier claim from the Darnytskyy Court.

21. On 4 October 2011 the trade union challenged the Boryspil Court's injunction of 29 September 2011 before the Kyiv Regional Court of Appeal ("the Court of Appeal"). It submitted, in particular, that the strike committee could not be a respondent in proceedings, since it was neither an individual

nor a legal entity. Nor was it empowered to act in courts on behalf of the employees who had decided to go on strike.

22. On 5 October 2011 the Court of Appeal dismissed the aforementioned appeal.

23. On 6 October 2011 the Boryspil Court found that the strike would be unlawful and banned it. The court relied on section 18 of the Transport Act, which prohibited strikes at transport enterprises if they affected passenger carriage. It noted that AeroSvit was an important passenger carrier operating over eighty international routes to thirty-three counties. Furthermore, given that one of the major tasks of the aircraft cabin crew was to ensure the safety of passengers, the court considered applicable section 24 of the Resolution of Labour Disputes Act, which prohibited strikes if they were likely to endanger human life or health. It also made a general reference to Article 44 of the Constitution.

24. The trade union appealed. It reiterated the arguments of its earlier appeal of 4 October 2011 concerning the standing of the strike committee. It also argued that the first-instance court had wrongly applied the Transport Act, when it should instead have applied the Resolution of Labour Disputes Act.

25. On 22 November and 19 December 2011 respectively the Kyiv Regional Court of Appeal and the Higher Specialised Court for Civil and Criminal Matters upheld the judgment of 6 October 2011.

26. On 20 January 2012 the Specialised Court's final ruling was served on the strike committee.

II. RELEVANT DOMESTIC LEGISLATION AND PRACTICE

A. Constitution of Ukraine (1996)

27. Article 44 reads as follows:

> "Employees have the right to strike in order to protect their economic and social interests.
>
> The procedure for exercising the right to strike shall be established by law, taking into account the need to ensure national security, the protection of health, and the rights and freedoms of other persons.
>
> No one shall be forced to participate or to not participate in a strike.
>
> A strike may only be prohibited on the basis of law."

B. Resolution of Labour Disputes (Conflicts) Act (1998, with further amendments) – *"Про порядок вирішення колективних трудових спорів (конфліктів)"*

28. The pertinent provisions are the following:

Section 3. Parties to a collective labour dispute

"The parties to a collective labour dispute shall be:

- at an occupational level – employees (certain categories of employees) ... or a trade union, or another organisation authorised by employees [to represent their interests] and the owner of an enterprise ... or [the employer's] representative ...

The body authorised by employees to represent [their interests] shall be the only authorised representative of the employees during the period such a dispute exists..."

Section 17. Strike

"A strike is a temporary, collective and voluntary cessation of work by employees (non-appearance at work, breach of labour duties) ... with the aim of resolving a collective labour dispute.

Strike action shall be an extreme means of resolving a collective labour dispute (when all other possibilities [for such resolution] have been exhausted) if [the employer] refuses to allow the claims of employees or of a body authorised by them, or of a trade union, or of an association of trade unions or of a body authorised by them."

Section 18. The right to strike

"Pursuant to Article 44 of the Constitution of Ukraine, employees have the right to strike in order to protect their economic and social interests.

The procedure for exercising the right to strike is established by this Act.

A strike may be commenced if conciliatory procedures have not led to the settlement of a collective labour dispute or if [the employer] avoids conciliatory procedures or does not comply with an agreement reached in the course of resolution of a collective labour dispute..."

Section 24. Cases in which it is prohibited to strike

"Striking shall be prohibited if the cessation of work by employees endangers human life or health or the environment, or if it hinders the prevention of a natural disaster, an accident, a catastrophe, an epidemic or an epizootic outbreak, or if it hampers rectification of their consequences.

Employees (with the exception of technical and maintenance personnel) of prosecution authorities, courts, military forces, state authorities, security and law-enforcement bodies shall be banned from striking..."

PART V. FINAL PROVISIONS.

"...3. Until other laws and by-laws are brought into compliance with this Act, they shall apply so far as they do not contradict it.

4. The Cabinet of Ministers of Ukraine shall submit proposals for bringing other laws and by-laws into compliance with this Act within three months...”

C. Transport Act (1994)

29. Section 18 “Strikes at transport enterprises” provides:

“Cessation of work (strike) at transport enterprises may take place if the enterprise’s management fails to comply with tariff agreements, except in cases where passenger transportation or maintenance of a continuous production cycle are concerned, and also where a strike would endanger human life or health.”

30. The above provision has not been amended since the Act entered in force in 1994. Some proposed amendments were drafted in 2001 following recommendations by the ILO Committee on Freedom of Association, but with no result (see paragraphs 38-40 below). Furthermore, on 26 August 2010 a draft law “On amendments to section 18 of the Transport Act with a view to bringing it into conformity with the Constitution of Ukraine and the Resolution of Labour Disputes (Conflicts) Act” was registered in the Verkhovna Rada (the Ukrainian Parliament). The final version of the draft proposed repealing section 18 altogether. On 15 June 2011 the Parliamentary Committee for Transport and Communication recommended that Parliament reject the draft text, and referred to the Cabinet of Ministers’ position that it would destabilise the transport sector and be harmful to the social and economic interests of the State. In consequence, the draft text was rejected.

D. Action by the Ukrainian Parliament Commissioner for Human Rights

31. On 15 January 2013 the Ukrainian Parliament Commissioner for Human Rights issued a press release with the following content:

Ms Valeriya Lutkovska: “The right of transport employees to strike must be settled on the legislative level”

“The Ukrainian Parliamentary Commissioner for Human Rights, Ms Valeriya Lutkovska, has sent a letter to Mr Mykola Azarov, the Prime Minister of Ukraine, concerning protection of the constitutional right to strike of transport employees. Representatives of the All-Ukrainian Trade Union of Pilots and also a trade union of stewards in an airline company have repeatedly applied to the Ombudsman concerning the unconstitutionality of the provisions of the Ukrainian Transport Act and violation of their legitimate rights.

Monitoring by the Commissioner has revealed that inadequate regulation of this issue has in fact made it impossible to protect the rights of transport employees, and has led to ambiguous interpretation of certain provisions of the law... In addition, [this lack of regulation] genuinely raises the possibility of mass violations of employment law by employers, and, at the same time, unplanned (unexpected) instances of unavailability of transportation services, etc.

The working group created by the Commissioner for Human Rights, with participation by representatives from the Ministry of Social Policy, the Ministry of Infrastructure, the Ministry of Economic Development and the National Service for Mediation and Reconciliation, and delegates from the joint representative bodies of employers and trade unions, drew up the draft Law of Ukraine "On amendments to certain legislative acts of Ukraine concerning guarantees for exercising the constitutional right to strike". It was proposed that section 18 of the Ukrainian Transport Act be worded as follows: "Strikes at transport enterprises shall take place in accordance with the legislation on the resolution of collective labour disputes (conflicts)". The words "[or] national security" were added to section 24 (1) of the Ukrainian Law "On the resolution of collective labour disputes (conflicts)" immediately after the words "human health".

According to the Commissioner for Human Rights Ms Valeriya Lutkovska, the Ministry of Social Policy, the Ministry of Infrastructure, the Ministry of Economic Development, the Secretariat of the Council of National Security and Defence and the trade-union representatives of trade unions agreed to the draft law without observations.

Taking into consideration the importance of resolving this issue on the legislative level, the Ombudsman Ms Valeriya Lutkovska...submitted for the Government's consideration the draft law thus drawn up, for subsequent submission to the Verkhovna Rada. The Prime Minister, Mr Mykola Azarov, instructed the heads of the Ministries of Infrastructure, Social Policy, Economic Development, Finance and Justice to examine the draft of the above-mentioned law and to introduce the agreed proposals to it. The Commissioner for Human Rights hopes that the draft law will soon be submitted for consideration by Parliament."

III. RELEVANT INTERNATIONAL MATERIALS

A. International Covenant on Economic, Social and Cultural Rights (1966)

32. Article 8 § 1 of the Covenant reads as follows:

"1. The States Parties to the present Convention undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade union organisations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country."

B. ILO principles concerning the right to strike

33. The pertinent principles of the International Labour Organisation (ILO) are summarised in its publication *"ILO Principles Concerning the Right to Strike"*, first published in the International Labour Review, Vol. 137 (1998), No. 4, with a further edition in 2000. The relevant extracts read as follows:

1. General issues

The basic principle of the right to strike

"... Over the years, in line with this principle, the Committee on Freedom of Association has recognized that strike action is a right and not simply a social act, and has also:

1. made it clear it is a right which workers and their organizations (trade unions, federations and confederations) are entitled to enjoy...;

2. reduced the number of categories of workers who may be deprived of this right, as well as the legal restrictions on its exercise, which should not be excessive;

3. linked the exercise of the right to strike to the objective of promoting and defending the economic and social interests of workers...;

4. stated that the legitimate exercise of the right to strike should not entail prejudicial penalties of any sort, which would imply acts of anti-union discrimination.

These views expressed by the Committee on Freedom of Association coincide in substance with those of the Committee of Experts..."

3. Workers who enjoy the right to strike and those who are excluded

"... the Committee has chosen to recognize a general right to strike, with the sole possible exceptions being those which may be imposed for public servants and workers in essential services in the strict sense of the term. Obviously, the Committee on Freedom of Association also accepts the prohibition of strikes in the event of an acute national emergency (ILO, 1996d, para. 527)..."

Essential services in the strict sense of the term

"Over time, the supervisory bodies of the ILO have brought greater precision to the concept of essential services in the strict sense of the term (for which strike action may be prohibited). In 1983, the Committee of Experts defined such services as those "the interruption of which would endanger the life, personal safety or health of the whole or part of the population" (ILO, 1983b, para. 214). This definition was adopted by the Committee on Freedom of Association shortly afterwards.

Clearly, what is meant by essential services in the strict sense of the term "depends to a large extent on the particular circumstances prevailing in a country"; likewise, there can be no doubt that "a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population" (ILO, 1996d, para. 541). The Committee on Freedom of Association has none the less given its opinion in a general manner on the essential or non-essential nature of a series of specific services.

Thus, the Committee has considered to be essential services in the strict sense, where the right to strike may be subject to major restrictions or even prohibitions, to be: the hospital sector; electricity services; water supply services; the telephone service; air traffic control (ibid., para. 544).

In contrast, the Committee has considered that, in general the following do not constitute essential services in the strict sense of the term, and therefore the prohibition to strike does not pertain (ibid., para 545):

... transport generally; ... aircraft repairs..

These few examples do not represent an exhaustive list of essential services. The Committee has not mentioned more services because its opinion is dependent on the nature of the specific situations and on the context which it has to examine and because complaints are rarely submitted regarding the prohibition of strikes in essential services..."

Terminological clarification regarding the concept of essential service and minimum service

"... When the Committee of Experts uses the expression "essential services" it refers only to essential services in the strict sense of the term (i.e. those the interruption of which would endanger the life, personal safety or health of the whole or part of the population), in which restrictions or even a prohibition may be justified, accompanied, however, by compensatory guarantees. Nevertheless, a "minimum service" "would be appropriate in situations in which a substantial restriction or total prohibition of strike action would not appear to be justified and where, without calling into question the right to strike of the large majority of workers, one might consider ensuring that users' basic needs are met and that facilities operate safely or without interruption" (ibid., para. 162) ..."

34. In the General Survey on the fundamental Conventions concerning rights at work in the light of the ILO Declaration on Social Justice for a Fair Globalisation (International Labour Conference, 101st session, 2012), the ILO Committee of Experts on the Implementation of Conventions and Recommendations (CEACR) indicated that the air transport should be excluded from "essential services" and that the right to strike of workers employed in that sector should be recognised.

C. Relevant case-law of the ILO Committee on Freedom of Association[1]

1. In respect of Ukraine (Case No. 2018)

35. On 23 February 1999 the Independent Trade Union of Workers of the Illichivsk Maritime Commercial Port lodged a complaint with the ILO Committee on Freedom of Association against the Government of Ukraine, alleging violations of trade union rights, including the right to strike. The

1. Set up by the ILO in 1951 for the purpose of examining complaints about violations of freedom of association, which may be brought against a member State by employers' and workers' organisations.

Government's reply was that, under the Transport Act, strikes were prohibited in continuously operating transport enterprises.

36. In its Report No. 318 of November 1999 (Report in which the committee requests to be informed of development), the Committee stated:

> "514. In cases concerning violations of the right to strike, the Committee has always recognized the right to strike of workers and their organizations as a legitimate means of defending their economic and social interests. It has also considered that the conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organizations. ... The Committee has also emphasized that while the right to strike may be restricted or prohibited in essential services in the strict sense of the term, that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population, provided that the workers are given appropriate guarantees, port activities generally do not constitute essential services in the strict sense of the term, although they are an important public service in which a minimum service could be required in case of a strike. ... The Committee, therefore, requests the Government to amend section 18 of the Transport Act to ensure that it cannot be construed as prohibiting strikes in ports.
>
> ...
>
> 516. In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:
>
> ...
>
> (d) As regards the court rulings that the strike planned for 7 September 1998 was illegal, the Committee, emphasizing that the ports do not constitute essential services in which strikes might be prohibited, although they are important public services in which a minimum service might be required in the event of a strike, requests the Government to amend section 18 of the Transport Act in order to ensure that it cannot be construed as allowing the prohibition of strikes in ports."

37. Subsequently, the Committee issued several reports on the effect given to its recommendations.

38. In particular, in November 2001 it issued Report No. 323, in which it referred to the Government's communication of August 2001 stating that the Ministry of Transport was preparing a new transport bill, which would include the following provisions:

> "Voluntary cessation of work (strike) in transport undertakings may be initiated in accordance with the procedure established under relevant legislation. Except in cases where such cessation of work would endanger the life and health of individuals or pose an environmental threat, hinder the prevention of natural disasters, accidents or major incidents, epidemic or epizootic outbreaks, or impede efforts to deal with the consequences of such events."

39. The Committee "note[d] with interest" the draft amendment in respect of section 18 of the Transport Act concerning strike action and requested the Government to keep it informed of the progress made in this respect.

40. The examination of the case by the Committee was, however, completed without any such progress being reported (see also paragraph 30 above concerning further drafting efforts).

2. In respect of other States

41. The ILO Committee on Freedom of Association has published its conclusions in a number of other transport cases in which it was found that restrictions on the right to strike are not in conformity with the ILO standards.

42. In particular, the relevant extracts from its 362nd Report (312th Session, Geneva, November 2011) read as follows:

- Case No 2841 (France): Report in which the Committee requests to be kept informed of developments:

> "1041. The Committee recalls that, in the airport sector, only air traffic control can be regarded as an essential service justifying restrictions on the right to strike. Neither the distribution of fuel to ensure that flights continue to operate, nor transport per se, can be therefore considered essential services in the strictest sense of the term. Moreover, economic consideration should not be invoked as a justification for restrictions on the right to strike. However, the Committee has, in the past, had cause to consider that when a service that is not essential in the strict sense of the term but is part of a very important sector in the country – as could be said of passenger and goods transport – is brought to a standstill, measures to guarantee a minimum service may be justified. Such a service could also be a potential alternative solution in situations in which a substantial restriction or total prohibition of strike action would not appear to be justified and where, without calling into question the right to strike of the large majority of workers, one might consider ensuring that users' basic needs are met or facilities operate safely or without interruption."

- Case No 2838 (Greece): Report in which the Committee requests to be kept informed of developments:

> "1076. ...the transportation of passengers and commercial goods is not an essential service in the strict sense of the term; however, this is a public service of primary importance where the requirement of a minimum service in the event of a strike can be justified... In general, the determination of minimum services and the minimum number of workers providing them should involve not only the public authorities, but also the relevant employers' and workers' organizations. This not only allows a careful exchange of viewpoints on what in a given situation can be considered to be the minimum services that are strictly necessary, but also contributes to guaranteeing that the scope of the minimum service does not result in the strike becoming ineffective in practice because of its limited impact, and to dissipating possible impressions in the trade union organizations that a strike has come to nothing because of over-generous and unilaterally fixed minimum services."

D. European Social Charter (revised), ratified by Ukraine on 21 December 2006

43. The relevant provisions read as follows:

"Article 6 – The right to bargain collectively

With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:

1. to promote joint consultation between workers and employers;

2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;

3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;

and recognise:

4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

Article G[1] – Restrictions

The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed.

Appendix to the Social Charter
Article 6, paragraph 4

It is understood that each Contracting Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article G[1]."

1. Rectified on 13 November 2014: the previous version read "Article 31".

E. Relevant case law of the European Committee of Social Rights

1. General principles of interpretation of Article 6 § 4 of the European Social Charter

44. In its Digest of the case-law of the European Committee of Social Rights of 1 September 2008, the Committee (whose function is to rule on the conformity of the situation in signatory States with the European Social Charter) stated as follows in the Section "Interpretation of the different provisions" (the quotation below is provided without the footnotes, which contain references to specific cases):

> **"3. Specific restrictions to the right to strike**
>
> The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.
>
> **i. Restrictions related to essential services/sectors**
>
> Prohibiting strikes in sectors which are essential to the community is deemed to serve a legitimate purpose since strikes in these sectors could pose a threat to public interest, national security and/or public health. However, simply banning strikes even in essential sectors – particularly when they are extensively defined, i.e. "energy" or "health" – is not deemed proportionate to the specific requirements of each sector. At most, the introduction of a minimum service requirement in these sectors might be considered in conformity with Article 6 § 4. ..."

2. Conclusions as regards collective action in Ukraine

45. On 22 October 2010 the Committee issued its conclusions (2010/def/UKR) on the situation in Ukraine as regards collective action. The relevant extracts read as follows:

> **Article 6 - Right to bargain collectively**
> ***Paragraph 4 - Collective action***
>
> "The Committee takes note of the information contained in the report submitted by Ukraine.
>
> Article 44 of the Constitution guarantees workers the right to strike to protect their economic and social interests.
>
> In addition Section 27 of the Law on Trade Unions guarantees the right of trade unions to, inter alia, organise and stage strikes in order to protect workers labour and socioeconomic rights. The Law on the Procedure of settlement of collective disputes contains provisions on the right to strike, including the procedure to be followed prior to exercising the right to strike, etc...

Specific restrictions to the right to strike

Under Article 6 § 4 the right to strike may be restricted provided that any restriction satisfies the conditions laid down in Article G[1] which provides that restrictions on the rights guaranteed by the Charter that are prescribed by law, serve a legitimate purpose and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals.

Restrictions related to essential service/sectors

The Committee notes that there are restrictions on the right to strike for workers in the emergency and rescue services, workers at nuclear facilities, workers in underground undertakings as well as workers at electric power engineering enterprises. The Committee recalls that restricting strikes in sectors which are essential to the community is deemed to serve a legitimate purpose since strikes in these sectors could pose a threat to public interest, national security and/or public health. However, simply banning strikes even in essential sectors – particularly when they are extensively defined, is not deemed proportionate to the specific requirements of each sector, but providing for the conformity with Article 6 § 4.

Therefore the Committee asks for further information on the extent of the restrictions on the right to strike in these sectors, in particular as regards "underground undertakings".

In addition the Committee notes that according to the report strikes in the transport sector may be prohibited, *inter alia*, if the transportation of passengers is affected. The Committee seeks confirmation that this interpretation is correct, in this respect it refers above to its case law mentioned above..."

3. Other case-law as regards restrictions to the right to strike in the transport and aviation sector

46. The relevant extract of Resolution CM/ResChS(2012)4 on collective complaint No. 32/2005 against Bulgaria reads as follows:

"[The Committee finds] that it has not been established that the restriction of the right to strike imposed by Section 51 of the [Railway Transport Act] pursues a legitimate purpose in the meaning of Article G[1]. The alleged and not further specified consequences for the economy do not qualify as a legitimate aim in this respect. In the absence of a legitimate purpose, the restriction to the right to strike according to Section 51 of the [Railway Transport Act] may not be considered as being necessary in a democratic society within the meaning of Article G[1]."

47. The relevant section of the conclusions of 22 October 2010 in respect of Lithuania reads as follows:

"Restrictions related to essential services/sectors

The Labour Code provides an obligation to provide minimum services to meet the immediate needs of the community in the event of strikes in undertakings and sectors covered by Article 77.4 of the Labour Code. Such minimum services are determined either by the Government after consultation with the Tripartite Council or by the

1. Rectified on 13 November 2014: the previous version read "Article 31".

relevant municipal executive after consultations with the parties to the collective dispute. The undertakings and sectors concerned are the railways and public transport, civil aviation, communications and energy enterprises, health care and pharmaceutical institutions, food, water, sewage and waste disposal enterprises, oil refineries, enterprises with a continuous production cycle and other enterprises where work stoppages would result in grave and hazardous consequences for the community or human life and health."

48. The relevant part of the conclusions of 30 June 2006 in respect of Slovenia reads as follows:

"The report ... points out that as regards the sectors of the police force, the defence forces, aviation, customs and railway transport, as well as other activities where a minimum level of the working process is required to be carried out, there have practically been no relevant strikes in recent years since disputes are resolved by negotiations following the prior announcement of a strike."

F. PACE Resolution 1442 (2005) "The right to strike in essential services: economic implications", adopted on 6 June 2005

49. The relevant extracts read as follows (emphasis added):

"1. As Europe undergoes rapid political, economic, social and cultural integration – within the European Union and in the wider Council of Europe area – the vulnerability of each country to disruptions in others is becoming increasingly pronounced. This holds also for strike actions in essential services, whether in public or private ownership, such as in the transport sector (especially air transport), or in public health, at a time of intensified international contacts and labour mobility. The wide differences in national legislation and practices between European countries are, against this background, increasingly at variance with the overall state of European integration and prejudicial to it.

2. Of further concern is the lack of balance in many countries between, on the one hand, the right to strike, including in essential services, as enshrined in various treaties from the Council of Europe's revised European Social Charter (ETS No. 163) to the European Union's Charter of Fundamental Rights, and, on the other hand, the fundamental right of citizens to pursue their lives unhindered, preserve their health and well-being, and the right of society to function and to maintain its overall ability to function as well as protect the health and welfare of its citizens. In certain European countries, this balance is seriously tilted against citizens and society.

3. The Parliamentary Assembly, against this background, calls on the governments of the member states of the Council of Europe:

- to carry out studies on the cost of strikes in essential public services to the national economy, companies and citizens, both directly in the form of lost output and indirectly such as through impaired social relations and harm done to a country's international reputation, and to collate and compare the results at the level of the Council of Europe;

- to intensify research and the exchange of information on laws and regulations in force in different Council of Europe member states as regards the right to strike in essential services or limitations thereto;

- to harmonise as far as possible national legislation governing strikes in essential services so that citizens throughout the Council of Europe area can be protected adequately and in a homogeneous manner;

- to make the fullest possible use toward this end of the provisions of the revised European Social Charter governing the right to strike and the protection of other social rights of citizens, including in the Charter's enforcement mechanism;

- to encourage similar efforts within the more limited membership of the European Union, via EU legislation capable of subsequently being applied, with the necessary adaptations, in the Council of Europe area as a whole."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

50. The applicants complained about the authorities' unconditional ban on their strike on the sole ground that they were employed by a passenger carrier. They relied on Article 11 of the Convention, which provides:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

A. Admissibility

1. Victim status of Mr Pushnyak

51. The Government noted that Mr Pushnyak was not a member of the strike committee against which the AeroSvit management had initiated proceedings seeking a ban on the planned strike. They further submitted that there were no materials in the case file confirming his membership of the trade union.

52. The Government went on to conclude that Mr Pushnyak could not be regarded as a victim of the alleged violation and that the application, in so far as it concerned him, should be declared inadmissible on that ground.

53. The applicants contested the Government's argument. They submitted that all of them, including Mr Pushnyak, had been employed by AeroSvit as aircraft cabin crew members. Furthermore, they were all members of the trade union. Moreover, they emphasised that Mr Pushnyak,

along with the other applicants, had taken part in person in the employees' general meeting of 9 September 2011 at which the strike had been announced (see paragraph 12 above).

54. The Court reiterates that the word "victim" in the context of Article 34 of the Convention denotes the person directly affected by the act or omission in issue (see *Lüdi v. Switzerland*, 15 June 1992, § 34, Series A no. 238).

55. In the present case, as rightly pointed out by the Government, the second set of the domestic proceedings were initiated only against the strike committee – that is, against six persons, and Mr Pushnyak was not one of their number.

56. At the same time it remains undisputed that the crux of the claim in those proceedings was the legitimacy of the strike planned by 150 employees of AeroSvit, including the applicants. Furthermore, it is established that all of the applicants were members of the company's trade union (see paragraph 7 above).

57. Accordingly, the Court considers that the respective judicial decisions directly affected all of the applicants in their right to strike.

58. The Court does not lose sight of its case-law that a person cannot complain of a violation of his or her rights in proceedings to which he or she was not a party, even if he or she was a shareholder and/or director of a company which was party to the proceedings (see *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, §§ 92 and 93, ECHR 2012).

59. However, given the nature of the right at stake here and the particularities of the strike committee's status and functions, it would be inappropriate to draw any parallels between the situation at hand and property-related disputes involving corporate entities, in the context of which the above principle was established (in addition to the case of *Centro Europa 7 S.r.l. and Di Stefano*, cited above, see, for other examples, *Agrotexim and Others v. Greece*, 24 October 1995, § 66, Series A no. 330-A, and *Camberrow MM5 AD v. Bulgaria* (dec.), no. 50357/99, 1 April 2004).

60. The Court therefore dismisses this objection by the Government.

2. Victim status of all the applicants

61. The Government further drew the Court's attention to the fact that the Boryspil Court had banned the strike in its injunction of 29 September 2011, whereas the strike had been scheduled to start on 28 September 2011. Accordingly, they argued that nothing had prevented the applicants from striking on 28 September 2011.

62. The applicants underlined that the strike had not been planned as a one-day event, and that it had been intended to continue striking until the employees' demands had been met in full. They submitted that the strike had not been launched on 28 September 2011, as foreseen, for the simple

reason that the Darnytskyy Court had been due to examine the case on the morning of that very day. Accordingly, it was decided to postpone the beginning of the strike pending the court's decision, which the employees expected to be in their favour.

63. The Court observes that the strike was indeed scheduled to start on 28 September 2011 and that it was banned a day later. The employees thus had one day to strike. It should be borne in mind, however, that the aim of the strike action was to resolve the collective labour dispute, and that the duration of the strike depended on when that would occur.

64. Having regard to the judicial action taken by the company's management and the fact that the hearing was scheduled for the day on which the strike was due to start, it was quite reasonable for the employees to postpone launching the strike until the court had examined the case. Were the court to ban the strike, it would have lasted for a only few hours by that point and would hardly have brought the strikers closer to their aims; equally, had the court not imposed the ban, the employees would have had been able to commence the strike with only an insignificant delay compared to their initial plan.

65. In these circumstances the Government's arguments cannot be accepted. The Court therefore dismisses this objection by the Government.

3. Otherwise as to the admissibility

66. The Court further notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions of the parties

(a) The applicants

67. The applicants argued that the strike ban had neither had an adequate legal basis nor pursued any legitimate aim.

68. They submitted that it had been based on obsolete provisions of the Transport Act providing for an unconditional ban on striking for employees of passenger carriers, which ran counter to the Constitution and to the Labour Disputes Act.

69. The applicants noted that the strike had been organised in compliance with the procedure laid down in the Resolution of Labour Disputes Act, that the strike committee had notified all relevant authorities and organisations about it, and that the employees had intended to continue to provide certain minimal services even during the strike. The applicants

therefore insisted that the strike would not have endangered the life or health of passengers and that the only danger it presented was loss of profit to the airline.

70. They referred in this connection to the pertinent ILO principles recognising a general right to strike, with the sole possible exceptions being in the event of an acute national emergency and those which could be imposed for public servants and workers in essential services in the strict sense of the term.

(b) The Government

71. The Government admitted that the ban on the AeroSvit employees' strike constituted an interference with the applicants' rights under Article 11 of the Convention.

72. They submitted, however, that that interference had been based on the provisions of the Constitution, the Transport Act and the Resolution of Labour Disputes Act, which were formulated, in their view, with sufficient precision and clarity. They argued that it had been lawful on that ground.

73. Lastly, the Government contended with reference to the domestic courts' findings that, had the strike been held, this would have endangered the life or health of the passengers whose flights were to be cancelled. That being the case, they maintained that the interference complained of had pursued a legitimate aim and had been necessary in a democratic society.

(c) The European Trade Union Confederation (ETUC)

74. The ETUC emphasised that the right to strike is essential for the functioning of trade unionism in free societies.

75. It gave a comprehensive review of the international legal instruments enshrining explicitly or implicitly that right, and invited the Court to interpret the right to freedom of association under Article 11 of the Convention accordingly.

76. Lastly, the ETUC noted that, according to the longstanding and well-established jurisprudence of the ILO supervisory bodies, the transport sector in general and civil aviation or aircraft-related services in particular are considered to be outside the scope of essential services, which would warrant a limited approach in justifying certain restrictions on the right to strike.

2. The Court's assessment

77. The Court considers, and this was the common ground between the parties, that the ban on the proposed strike action constituted an interference with the applicants' right to freedom of association under Article 11 of the Convention.

78. Having regard to its case-law illustrating that strike action is clearly protected by Article 11 (see National Union of Rail, Maritime and Transport Workers v. the United Kingdom, no. 31045/10, § 84, 8 April 2014, with further references), the Court sees no reasons for holding otherwise.

79. The Court further notes that such interference will constitute a breach of Article 11 of the Convention unless it was "prescribed by law", pursued one or more legitimate aims and was "necessary in a democratic society" for the achievement of those aims.

80. The Court reiterates that the expression "prescribed by law" in Article 11 of the Convention not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of law in question. The law should be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, for example, *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I).

81. The Court notes that the domestic courts based the strike ban complained of in the present case on section 18 of the Transport Act, section 24 of the Resolution of Labour Disputes Act and Article 44 of the Constitution of Ukraine (see paragraphs 23 and 27-29 above). It thus appears that the interference had a basis in domestic law. The Court has no reason to doubt that the above-mentioned legal provisions were accessible. It remains, therefore, to be determined whether they were also sufficiently clear and foreseeable.

82. The Court observes that the Constitution of Ukraine, which entered into force in 1996, enshrines the right to strike as a means for protection of the economic and social interests of employees. As regards the procedures for exercising that right or the grounds for prohibiting a strike, these matters are to be regulated by legislation (see paragraph 27 above).

83. The two applicable laws are the above-mentioned Resolution of Labour Disputes Act and the Transport Act. The Court notes that section 24 of the 1998 Resolution of Labour Disputes Act, which concerns labour disputes in all sectors, prohibits strikes in the following cases: "if the cessation of work by employees endangers human life or health or the environment, or if it hinders prevention of a natural disaster, an accident, a catastrophe, an epidemic or an epizootic outbreak, or hampers rectification of their consequences" (see paragraph 28 above). Nothing in the wording used suggests that this list is not exhaustive. At the same time, section 18 of the 1994 Transport Act, which has not been amended since its adoption and which concerns the transport sector alone, also stipulates in which situations strikes must be prohibited. This provision is much more restrictive: in addition to cases where a strike endangers human life or health, it must be prohibited "where passenger transportation or maintenance of a continuous production cycle are concerned" (see paragraph 29 above).

84. It is remarkable that, although the Resolution of Labour Disputes Act provides in its Final Provisions that other laws and regulations should be applicable only in the part which does not contradict that Act, and that they should be brought into compliance with it, the Transport Act nonetheless has so far continued to apply without amendment for the sixteen or so years since the Resolution of Labour Disputes Act entered into force in 1998 (see, by comparison, *Vyerentsov v. Ukraine*, no. 20372/11, § 55, 11 April 2013). This remains the case despite the fact that the above-mentioned inconsistency and the necessity of bringing the Transport Act into conformity with the Ukrainian Constitution and the Resolution of Labour Disputes Act has been admitted on many occasions (see, in particular, paragraphs 30, 31 and 38 above).

85. The foregoing considerations are sufficient to enable the Court to conclude that the interference with the applicants' rights under Article 11 of the Convention was not based on sufficiently clear and foreseeable legislation.

86. There has accordingly been a violation of Article 11 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

87. 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

88. The applicants claimed 2,400,000 euros (EUR) in respect of pecuniary damage. According to their calculations, that was the amount of salary arrears owed by the company management to the total of 404 cabin crew members for 2008-2012. The applicants also claimed EUR 1,600,000 in respect of non-pecuniary damage. They referred in this connection to the bankruptcy proceedings initiated by the company's management, allegedly unlawfully and which, in their view, a strike could have averted.

89. The Government contested those claims as irrelevant, exorbitant and unsubstantiated.

90. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, it awards to the applicants jointly EUR 20,000 in respect of non-pecuniary damage.

B. Costs and expenses

91. The applicants did not make any claim under this head. The Court therefore makes no award.

C. Default interest

92. The Court considers it appropriate that the default interest rate 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

1. *Declares* unanimously the application admissible;

2. *Holds* unanimously that there has been a violation of Article 11 of the Convention;

3. *Holds*, by six votes to one
   (a) that the respondent State is to pay to the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 20,000 (twenty thousand euros) in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 2 October 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President