



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

FOURTH SECTION

CASE OF DIOGENOUS AND TSERIOTIS v. TURKEY

(Application no. 16259/90)

JUDGMENT
(Just satisfaction)

STRASBOURG

26 October 2010

FINAL

11/04/2011

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

In the case of Diogenous and Tseriotis v. Turkey,

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

Nicolas Bratza, *President*,
 Lech Garlicki,
 Ljiljana Mijović,
 David Thór Björgvinsson,
 Ján Šikuta,
 Päivi Hirvelä,
 Işıl Karakaş, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 5 October 2010,

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

PROCEDURE

1. The case originated in an application (no. 16259/90) against the Republic of Turkey lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Cypriot nationals, Mrs Anna Diogenous and Mrs Pandora Tseriotis (“the applicants”), on 23 February 1990.

2. In a judgment delivered on 22 September 2009 (“the principal judgment”), the Court dismissed various preliminary objections raised by the Turkish Government and found continuing violations of Article 8 of the Convention by reason of the complete denial of the right of the applicants to respect for their home and of Article 1 of Protocol No. 1 to the Convention by virtue of the fact that the applicants were denied access to and control, use and enjoyment of their properties as well as any compensation for the interference with their property rights. Furthermore, it found that it was not necessary to examine the applicants’ complaint under Article 1 of the Convention (*Diogenous and Tseriotis v. Turkey*, no. 16259/90, §§ 11, 23, 32 and 34 and points 1-4 of the operative provisions, 22 September 2009).

3. Under Article 41 of the Convention the applicants sought just satisfaction of 632,668 Cypriot pounds (CYP – approximately 1,080,976 euros (EUR)) for the deprivation of their properties concerning the period between January 1987, when the respondent Government accepted the right of individual petition, and 31 December 2007. Two valuation reports, setting out the basis of the applicants’ loss, were appended to their observations. Furthermore, the applicants claimed approximately EUR 255,032 each in respect of non-pecuniary damage and approximately EUR 11,287 for the costs and expenses incurred before the Court.

4. Since the question of the application of Article 41 of the Convention was not ready for decision, the Court reserved it in whole and invited the Government and the applicants to submit, within three months, their written observations on that issue and, in particular, to notify the Court of any agreement they might reach (*ibid.*, §§ 49 and 52, and point 5 of the operative provisions).

5. On 4 March 2010 the Court invited the applicants and the Government to submit any materials which they considered relevant to assessing the 1974 market value of the property concerned by the principal judgment. The applicants were moreover invited to submit written evidence that the property at stake was still registered in their name or to indicate and substantiate any transfer of ownership which might have taken place.

6. The applicants and the Government each filed observations on these matters. On 26 May 2010 the applicants produced certificates of ownership of Turkish-occupied immovable property issued by the Department of Lands and Surveys of the Republic of Cyprus. It transpires from these documents that on 16 March 2010 the property described in paragraph 13 below was registered in the name of the applicants.

THE LAW

I. PRELIMINARY ISSUE

7. In a letter of 22 April 2010 the Government requested the Court to decide that it was not necessary to continue the examination of the applicants' just satisfaction claims. They invoked the principles affirmed by the Grand Chamber in *Demopoulos and Others v. Turkey* ([GC] (Dec.), nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04, 1 March 2010) and argued that the applicants should address their claims to the Immoveable Property Commission (the "IPC") instituted by the "TRNC" Law 67/2005. They reiterated their position on the issue of exhaustion of domestic remedies in the present case and in other similar cases on 8 and 22 June 2010.

8. The Court first observes that the Government's submissions were unsolicited; they were received by the Registry long after the expiration of the time-limit for filing comments on just satisfaction and almost two months after the delivery of the Grand Chamber's decision in *Demopoulos*. It could therefore be held that the Government are estopped from raising the matter at this stage of the proceedings.

9. In any event, the Court cannot but reiterate its case-law according to which objections based on non-exhaustion of domestic remedies raised after

an application has been declared admissible cannot be taken into account at the merits stage (see *Demades v. Turkey* (merits), no. 16219/90, § 20, 31 July 2003, and *Alexandrou v. Turkey* (merits), no. 16162/90, § 21, 20 January 2009) or at a later stage. This approach has not been modified by the Grand Chamber, as the cases of *Demopoulos and Others* had not been declared admissible when Law 67/2005 entered into force and when Turkey objected that domestic remedies had not been exhausted.

10. Furthermore, the Court considers that its previous finding in the present case that the applicants were not required to exhaust the remedy introduced by Law 67/2005 constitutes *res judicata*. It recalls that after the compensation mechanism before the IPC was introduced, the Government raised an objection based on non-exhaustion of domestic remedies. This objection was rejected in the principal judgment (see paragraph 11 of the principal judgment and point 1 of its operative provisions). The Government also unsuccessfully requested the referral of the case to the Grand Chamber.

11. It follows that the Government's request to stay the examination of the applicants' claims for just satisfaction should be rejected. The Court will therefore continue to examine the case under Article 41 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

12. 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. Pecuniary and non-pecuniary damage

1. *The parties' submissions*

(a) **The applicants**

13. In their just satisfaction claims of September 1999, the applicants requested CYP 245,299 (approximately EUR 419,117) for pecuniary damage. They relied on an expert's report assessing the value of their losses which included the loss of annual rent collected or expected to be collected from renting out their house in the District of Kyrenia, plus interest from the date on which such rents were due until the day of payment. In February 1985 the house at issue had been donated to the applicants in equal shares by their mother. It had been constructed on plot no. 119 (registration no. 1204, sheet/plan XII/20.E.1, Block D, area: 725 square metres), located on the beach of Akti Kimonos; it consisted of 2 garages/playroom/beach

facilities on the sea level, a living-dining area with a fire-place, one bedroom, a shower, a kitchen and a large covered veranda on the upper ground floor, four bedrooms with a bathroom on the first floor (see paragraph 8 of the principal judgment).

14. The rent claimed was for the period dating back to January 1987, when the respondent Government accepted the right of individual petition, until January 2000. The applicants did not claim compensation for any purported expropriation since they were still the legal owners of the property. The valuation report contained a description of the town of Kyrenia, of its development perspectives and of the applicants' property.

15. The starting point of the valuation report was the rental value of the applicants' property in 1974, calculated as a percentage (5 %) of its estimated market value (CYP 75,000 – approximately EUR 128,145; the total annual rent in 1974 was thus CYP 3,750 – approximately EUR 6,407). The expert took into account the fact that the applicants' property was somehow unique and that there had been no sales of really comparable plots. He further examined the trends of rent increase on the basis of: (a) the nature of the area of property; (b) the trends for the period 1970-1974; (c) the trends in the unoccupied areas of Cyprus from 1974 onwards. This last trend was based on the Consumer Price Index for rents and houses issued by the Department of Statistics and Research of the Government of Cyprus, increased by a percentage of 25 %. Moreover, compound interest for delayed payment was applied at a rate of 8 % per annum.

16. On 23 January 2008, following a request from the Court for an update on the developments of the case, the applicants submitted updated claims for just satisfaction, which were meant to cover the loss of the use of the property from 1 January 1987 to 31 December 2007. They produced a revised valuation report, which, on the basis of the criteria adopted in the previous report, concluded that the sum due was CYP 314,591 plus CYP 318,077 for interest. The total sum claimed under this head was thus CYP 632,668 (approximately EUR 1,080,976). Taking into account the fact that their home was freely occupied by the Turkish army, the applicants further claimed the additional sum of EUR 3,500 per month, to be paid on a yearly basis and to be adjusted in accordance with inflation for a period of 18 years or until the Turkish army vacated the premises.

17. On 26 May 2010 the applicants produced another revised valuation report, which was meant to cover the loss of use for the period between 1 January 1987 and 30 June 2010. The expert appointed by the applicants considered that the whole sum due to his clients for pecuniary damage was EUR 1,164,792.

18. The expert considered that the 1974 market value of the land on which the applicants' house was constructed was CYP 60 (approximately EUR 102) per square metre; the total price of this land was therefore CYP 43,500 (approximately EUR 74,324). He referred, on this point, to the

sales, in 1972 and 1973, of four building sites in Kyrenia, showing that the prices per square metre were CYP 23.92, CYP 25.46, CYP 45.30 and CYP 70 respectively. In the expert's opinion, only the fourth building site had characteristics and size (800 square metres) comparable to those of the applicants' plot of land. Using as a starting point a table on "average cost per square metre of dwellings in the private sector 1984-2008", the expert also considered that the cost of construction was CYP 30 (approximately EUR 51) per square metre for the lower ground floor and CYP 55 (approximately EUR 94) per square metre for the ground and first floors, thus a total construction cost of CYP 16,860 (approximately EUR 28,806). Applying a "development factor" of 25%, he concluded that the 1974 market value of the house and of the land on which it was erected could be fixed at CYP 75,000 (approximately EUR 128,145).

19. In their just satisfaction claims of September 1999, the applicants further claimed CYP 120,000 (approximately EUR 205,032) each in respect of non-pecuniary damage. In particular, each of the applicants claimed CYP 30,000 for the anguish and frustration she suffered on account of the continuing violation of her property rights. They stated that this sum had been calculated on the basis of the sum awarded by the Court in the *Loizidou* case ((just satisfaction), 28 July 1998, *Reports of Judgments and Decisions* 1998-IV), taking into account, however, that the period of time for which the damage was claimed in the instant case was longer. The applicants also claimed CYP 90,000 each for the distress and suffering they had been subjected to due to the denial of their right to respect for their home.

20. In their updated claims for just satisfaction of 23 January 2008, the applicants requested the additional sum of EUR 50,000 each for non-pecuniary damage.

(b) The Government

21. The Government filed comments on the applicants' updated claims for just satisfaction on 30 June 2008, 15 October 2008 and 22 June 2010. They pointed out that the present application was part of a cluster of similar cases raising a number of problematic issues and noted that some applicants had shared properties and that it was not proved that their co-owners had agreed to the partition of the possessions. Nor, when claiming damages based on the assumption that the properties had been rented after 1974, had the applicants shown that the rights of the said co-owners under domestic law had been respected.

22. The Government further submitted that as an annual increase of the value of the properties had been applied, it would be unfair to add compound interest for delayed payment, and that Turkey had recognised the jurisdiction of the Court on 21 January 1990, and not in January 1987. In any event, the alleged 1974 market value of the properties was exorbitant,

highly excessive and speculative; it was not based on any real data with which to make a comparison and made insufficient allowance for the volatility of the property market and its susceptibility to influences both domestic and international. The report submitted by the applicants had instead proceeded on the assumption that the property market would have continued to flourish with sustained growth during the whole period under consideration.

23. The Government produced a valuation report prepared by the Turkish-Cypriot authorities, which they considered to be based on a “realistic assessment of the 1974 market values, having regard to the relevant land records and comparative sales in the areas where the propert[y] [was] situated”. This report contained two proposals, assessing, respectively, the sum due for the loss of use of the property and its present value. The second proposal was made in order to give the applicants the option to sell the property to the State, thereby relinquishing title to and claims in respect of it.

24. The report prepared by the Turkish-Cypriot authorities specified that it would be possible to envisage, either immediately or after the resolution of the Cyprus problem, restitution of the property described in paragraph 13 above. This property could also give entitlement to financial compensation, to be calculated on the basis of the loss of income (by applying a 5 % rent on the 1974 market values) and increase in value of the property between 1974 and the date of payment. Had the applicants applied to the IPC, the latter would have offered CYP 51,710.23 (approximately EUR 88,352) to compensate the loss of use and CYP 55,078.40 (approximately EUR 94,106) for the value of the property. According to an expert appointed by the authorities of the “TRNC”, the 1974 open-market value of the property described in paragraph 13 above was CYP 9,000 (approximately EUR 15,377). Upon fulfilment of certain conditions, the IPC could also have offered the applicants exchange of their property with Turkish-Cypriot properties located in the south of the island.

25. In their comments of 22 June 2010, the Government recalled that in the case of *Demopoulos and Others* (cited above) the Grand Chamber had found that the IPC was an adequate domestic remedy for those claiming a violation of Article 1 of Protocol No. 1. Notwithstanding the adoption of a judgment on the merits, it would still be open to the applicants to apply to the IPC, which would calculate the current value and the 1974 value of the property “in a credential way based on actual data”. On 27 May 2010 the IPC had sent a letter to the applicants’ representative, inviting his clients to introduce an application before it.

26. The Government recalled that under Law No. 67/2005, the following means of redress were available: a) restitution; b) compensation; c) exchange. The relevant provisions of the law at issue are described in *Demopoulos and Others* (cited above, §§ 35-37).

27. The Government further noted that in making its assessment as regarded compensation for the loss of use, the IPC had collected data from the Department of Lands and Surveys on the 1973-1974 purchase prices for comparable properties. It had also examined the development of interest rates of the Cyprus Central Bank. The loss of income was then calculated by assuming that the obtainable rent would have been 5% of the value of the properties; this last value had been modified every year on the basis of the land market value index. Cyprus Central Bank interest rates had been applied on the sums due since 1974.

28. Being in possession of the land registers, the Turkish-Cypriot authorities were in a better position than the applicants and the Greek-Cypriot authorities to assess the market values of the properties in a realistic and reliable manner. The applicants had put forward exaggerated claims and had tended to inflate the 1974 values of their possessions. The Government therefore requested the Court to rule on compensation on the basis of the calculations made by the Turkish-Cypriot authorities, which were “credential and objective in every aspect”.

29. The report prepared by the Turkish-Cypriot authorities confirmed that it would be possible to envisage restitution of the property described in paragraph 13 above. Had the applicants applied to the IPC, the latter would have increased its offer up to CYP 59,142.85 (approximately EUR 101,051) to compensate the loss of use and up to CYP 60,290.97 (approximately EUR 103,013) for the value of the property. The expert appointed by the authorities of the “TRNC” also confirmed the 1974 open-market value of the applicants’ house as indicated in paragraph 24 above.

30. Finally, the Government considered that the amount claimed in respect of non-pecuniary damage was excessive and unrealistic; given the existence of an effective domestic remedy, the Court should keep the award for such damage to a minimum.

2. The Court’s assessment

31. The Court recalls that it has concluded that there had been a continuing violation of the applicants’ rights guaranteed by Article 8 of the Convention and Article 1 of Protocol No. 1 by reason of the complete denial of the rights of the applicants with respect to their home and the peaceful enjoyment of their properties in northern Cyprus (see paragraphs 32 and 23 of the principal judgment). Furthermore, its finding of a violation of Article 1 of Protocol No. 1 was based on the fact that, as a consequence of being continuously denied access to their house since 1974, the applicants had effectively lost all access and control as well as all possibilities to use and enjoy their property (see paragraph 21 of the principal judgment). They are therefore entitled to a measure of compensation in respect of losses directly related to this violation of their rights as from the date of deposit of Turkey’s declaration recognising the right of individual petition under

former Article 25 of the Convention, namely 22 January 1987, until the present time (see *Cankoçak v. Turkey*, nos. 25182/94 and 26956/95, § 26, 20 February 2001, and *Demades v. Turkey* (just satisfaction), no. 16219/90, § 21, 22 April 2008).

32. In connection with this, the Court observes that the affirmation of ownership of Turkish-occupied immovable properties produced by the applicants (see paragraph 6 above) show that on 16 March 2010 they were still the owners of the property described in paragraph 13 above.

33. In the opinion of the Court, the valuations furnished by the applicants involve a significant degree of speculation and make insufficient allowance for the volatility of the property market and its susceptibility to influences both domestic and international (see *Loizidou* (just satisfaction), cited above, § 31). Accordingly, in assessing the pecuniary damage sustained by the applicants, the Court has, as far as appropriate, considered the estimates provided by them (see *Xenides-Arestis v. Turkey* (just satisfaction), no. 46347/99, § 41, 7 December 2006). In general it considers as reasonable the approach to assessing the loss suffered by the applicants with reference to the annual ground rent, calculated as a percentage of the market value of the property, that could have been earned during the relevant period (*Loizidou* (just satisfaction), cited above, § 33, and *Demades* (just satisfaction), cited above, § 23). Furthermore, the Court has taken into account the uncertainties, inherent in any attempt to quantify the real losses incurred by the applicant (see *Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 102, Series A no. 310, and (merits) 18 December 1996, § 32, *Reports* 1996-VI).

34. The Court notes that notwithstanding its request to submit material relevant to assessing the 1974 market value of the applicants' house, the parties have produced few elements in this respect. The Government have relied on the accuracy of the IPC's calculations (see paragraphs 23 and 27-28 above), while the applicants have referred to the sales, in 1972 and 1973, of four building sites in Kyrenia (see paragraph 18 above).

35. The Court further observes that the applicants submitted an additional claim in the form of annual compound interest in respect of the losses on account of the delay in the payment of the sums due. While the Court considers that a certain amount of compensation in the form of statutory interest should be awarded to the applicants, it finds that the rates applied by them are on the high side (see, *mutatis mutandis*, *Demades* (just satisfaction), cited above, § 24). Moreover, the Court does not see why the fact, claimed by the applicants (see paragraph 16 above), that their house had been occupied by the Turkish army should give entitlement to an additional monthly sum.

36. Finally, the Court is of the opinion that an award should be made in respect of the anguish and feelings of helplessness and frustration which the applicants must have experienced over the years in not being able to use

their property as they saw fit and to enjoy their home (see *Demades* (just satisfaction), cited above, § 29, and *Xenides-Arestis* (just satisfaction), cited above, § 47).

37. Having regard to the above considerations, the Court is of the opinion that the sums claimed by the applicants in respect of pecuniary and non-pecuniary damage (respectively EUR 1,164,792 and EUR 510,064 – see paragraphs 17 and 19-20 above) are excessive. At the same time, the amount which the “TRNC” authorities could have offered the applicants in respect of loss of use (approximately EUR 101,051 – see paragraph 29 above) does not seem to take into due account the nature of the property owned by the applicant and described in paragraph 13 above. It consisted in a house erected on three levels located on the beach of Akti Kimonos. Making its assessment on an equitable basis, the Court decides to award the applicants EUR 200,000 in respect of pecuniary and non-pecuniary damage.

B. Costs and expenses

38. In their just satisfaction claims of September 1999 relying on bills from their representative, the applicants sought CYP 2,002.32 (approximately EUR 3,421) for the costs and expenses incurred before the Court. This sum included CYP 800 (approximately EUR 1,366) for the cost of the expert report assessing the value of their property. In their written observations of 15 January 2004, the applicants claimed additional legal fees for CYP 2,645 (approximately EUR 4,519). Finally, in their updated claims for just satisfaction of 23 January 2008, they submitted additional bills of costs for the new valuation report and for legal fees amounting to EUR 392.15 and EUR 2,955.5 respectively. The total sum sought for costs and expenses was thus approximately EUR 11,287.65. Finally, on 26 May 2010 the applicants submitted that their further legal fees and expert report’s costs amounted to EUR 2,955.5 and EUR 1,000 respectively.

39. The Government did not comment on this point.

40. According to the Court’s case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

41. The Court notes that the case involved perusing a certain amount of factual and documentary evidence and required a fair degree of research and preparation. In particular, the costs associated with producing valuation reports in view of the continuing nature of the violations at stake were essential to enable the Court to reach its decision regarding the issue of just satisfaction (see *Demades* (just satisfaction), cited above, § 34).

42. Although the Court does not doubt that the fees claimed were actually incurred, it considers the amount claimed for the costs and expenses relating to the proceedings before it excessive and decides to award a total sum of EUR 8,000.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's request to stay the examination of the applicants' claims for just satisfaction;
2. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 200,000 (two hundred thousand euros), plus any tax that may be chargeable, in respect of pecuniary and non-pecuniary damage;
 - (ii) EUR 8,000 (eight thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
3. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 26 October 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Nicolas Bratza
President