



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

SECOND SECTION

CASE OF ERBEY v. TURKEY

(Application no. 29188/02)

JUDGMENT
(just satisfaction)

STRASBOURG

26 October 2010

FINAL

11/04/2011

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

In the case of Erbey v. Turkey,

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

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Danutė Jočienė,

Dragoljub Popović,

András Sajó,

Nona Tsotsoria,

Işıl Karakaş, *judges*,

and Stanley Naismith, *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. 29188/02) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Cemil Erbey (“the applicant”)¹, on 23 May 2002.

2. In a judgment delivered on 10 March 2009 (“the principal judgment”), the Court held that the failure to award any compensation to the applicant for the deprivation of his land had amounted to a violation of Article 1 of Protocol No. 1 to the Convention (see *Erbey v. Turkey*, no. 29188/02, § 27, 10 March 2009).

3. Under Article 41 of the Convention the applicant sought just satisfaction for the deprivation of his land.

4. Since the question of the application of Article 41 of the Convention was not ready for decision, the Court reserved it and invited the Government and the applicant to submit, within six months of the date of notification of the judgment, their written observations on that issue and, in particular, to notify the Court of any agreement they might reach (*ibid.*, § 31, and point 4 of the operative provisions).

5. In a letter dated 17 May 2009 the applicant submitted his observations on the matter, which were transmitted to the Government. On 1 December 2009 the Government replied to that letter.

1. The applicant died on 21 August 2008; the proceedings are continued by his heirs, namely Ms Hatice Erbey, Mr Mehmet Erbey and Ms Emine Sönmez (Erbey). For the sake of convenience, however, Mr Cemil Erbey will be continued to be referred to as the “applicant” in the text of this judgment.

6. In the meantime, in a letter of 10 June 2009 the Government requested the referral of the case to the Grand Chamber. This request was rejected by the panel of five judges of the Grand Chamber on 14 September 2009.

THE LAW

7. 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

1. *The parties' submissions*

(a) The applicant

8. The applicant did not submit a claim for non-pecuniary damage. However, he claimed 6,500,000 euros (EUR) in respect of pecuniary damage arising from the deprivation of his land, which was located in the Menemen district of İzmir, and which had a total surface area of 36,560 square metres. In this connection, the applicant submitted three different assessment reports in respect of the value of the land, two of which were prepared by court-appointed experts and the third by an independent group of experts.

(i) *Declaratory judgment of the Menemen Civil Court on the value of the land*

9. On 17 February 2009 the applicant's heirs brought an action seeking a declaratory judgment (*tespit davası*) before Menemen Civil Court with the aim of establishing the value of the land at issue in May 2002, the date the present application was brought before the Court.

10. On 12 March 2009 three experts appointed by Menemen Civil Court, namely a civil engineer, a cadastral expert and a real estate expert, submitted their assessment report. They determined the value of the land, which was qualified as a field (“*tarla*”) in the land registry records, as 1,450,000 Turkish liras (TRY) (equivalent to approximately EUR 1,150,000 at the material time) in May 2002. In making this assessment they had regard to the fact that the land was in a residential zone and was located near the town centre, with easy access to transport and main roads, and that

it benefited from municipal services. It appears that they also took into account the prices of comparable properties in the vicinity.

11. On 16 March 2009 the applicant's heirs objected to the assessment report and requested the court to appoint new experts. They argued that the report was based only on experts' subjective evaluations and that it did not sufficiently incorporate established data, such as real estate prices in the area or the added value created by the land's good location.

12. On 17 March 2009 Menemen Civil Court rejected the applicant's heirs' request. It held that the report provided a fair and objective assessment of the land on the basis of scientific and other relevant data.

13. On an unspecified date Menemen Civil Court requested an additional report from the same experts, for reasons that cannot be ascertained from the information in the case file.

14. On 2 April 2009 the experts submitted their new report, where they maintained their previous assessment regarding the value of the relevant land.

(ii) Declaratory judgment of Karşıyaka Civil Court on the value of the land

15. On 23 March 2009 the applicant's heirs brought another action for a declaratory judgment, this time before Karşıyaka Civil Court, to determine the value of the disputed land in May 2002.

16. On 13 May 2009 four experts appointed by Karşıyaka Civil Court, namely two civil engineers, a cadastral expert and a real estate expert, submitted their assessment report. They determined the market value of the land as TRY 3,005,232 (equivalent to approximately EUR 1,303,600) on 23 March 2009, the date when the action was brought, having regard to its zoning status, residential capacity, location, accessibility to public services and the market prices of comparable properties.

17. On 15 May 2009 the applicant's heirs objected to this assessment and requested an additional report. It appears that this objection was dismissed by Karşıyaka Civil Court.

(iii) Independent assessment of the value of the land

18. On an unspecified date the applicant's heirs consulted a group of independent experts made up of a civil engineer, an architect, a real estate expert and a geodesic engineer for the purposes of valuing the land in question.

19. According to the report submitted by the independent experts on 14 May 2009, the market value of the land was TRY 2,841,443 (equivalent to approximately EUR 2,200,000) in May 2002. In their opinion, the previous assessments carried out by court-appointed experts were superficial and did not involve thorough and accurate research into the market value of comparable properties.

(b) The Government

20. The Government submitted in the first place that the applicant should have sought compensation through domestic remedies, relying on the strict obligation on the administration to keep land registry records under Article 1007 of the new Civil Code. The Government further maintained that the amount of pecuniary damage requested by the applicant's heirs was excessive and unsubstantiated and that an objective assessment could only be carried out by authorised experts appointed by domestic courts.

2. The Court's assessment

21. As the Court has held on a number of occasions, a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 32, ECHR 2000-XI). The Contracting States that are parties to a case are in principle free to choose the means by which they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). If the nature of the violation allows *restitutio in integrum*, it is the duty of the State held liable to effect it, the Court having neither the power nor in practice the ability to do so itself. If, however, national law does not allow – or allows only partial – reparation to be made for the consequences of a breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate (see *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 19, ECHR 2001-I).

22. In its principal judgment the Court held that in the absence of compensation in exchange for the property, the interference in question, although prescribed by law, had not struck a fair balance between the demands of the general interest of the community and the requirement to protect the individual's fundamental rights. In other words, it was not the occupation of the applicant's land as such that was at the origin of the breach found, but the cancellation of the applicant's title pursuant to a law that was applied retrospectively and which contained no provision for compensation (see *I.R.S. and Others v. Turkey* (just satisfaction), no. 26338/95, § 23, 31 May 2005). In these circumstances, and having regard to its case-law (see *I.R.S. and Others*, cited above, §§ 23 and 24; *Scordino v. Italy* (no. 1) [GC], no. 36813/97, §§ 246-259; *Guiso-Gallissay v. Italy* (just satisfaction) [GC], no. 58858/00, §§ 102-107, 22 December 2009), the Court considers that an award for pecuniary damage reflecting

the value of the property on the date on which the applicant lost ownership of the land definitively, namely 17 September 2001, appears to be the most appropriate just satisfaction for the applicant. The Court considers that such an award principally corresponds to the amount that the applicant could legitimately expect to have obtained as compensation for the loss of his property, had there been a mechanism to request such compensation.

23. As to the determination of the amount of this compensation, the Court notes that the applicant submitted three different expert reports on the value of the disputed land, two of them prepared by court-appointed experts and the last one obtained from an independent source. The Government, on the other hand, made no submissions, merely stating that a fair assessment could only be made by authorised court-appointed experts. The Court further notes that there is considerable divergence between the values proposed by the court-appointed and the independent experts. Bearing in mind that the former values were obtained through a judicial process, albeit non-adversarial, the Court considers it appropriate to base itself on the findings of the court-ordered expert reports, although it does not consider itself bound by them (see *Kozacioğlu v. Turkey* [GC], no. 2334/03, § 85, ECHR 2009-...).

24. Having regard to these factors and ruling on an equitable basis by taking into account various factors liable to reduce or to increase the assessed value, the Court considers that it is reasonable to award the applicant the sum of EUR 1,500,000 for pecuniary damage, together with any tax that may be chargeable on this amount (see *Guiso-Gallisay*, cited above, § 105).

25. Moreover, the Court cannot accept the Government's argument that the applicant should have sought compensation through domestic remedies. The Court notes that the very reason for the finding of a violation under Article 1 of Protocol No. 1 in the principal judgment was the unavailability of such a compensation mechanism under Article 38 of the Expropriation Act (Law no. 2942 of 4 November 1983) at the relevant time. The Court considers that it is far from clear whether the remedy suggested by the Government, that is the seizing of domestic courts on the basis of the strict obligation on the administration to keep accurate land registry records under Article 1007 of the new Civil Code, was capable of providing any relief to the applicant in the circumstances of the present case. The Government, for their part, have not submitted any evidence to the contrary. Lastly, the Court considers in any event that it has already declared the applicant to be the victim of a breach of Protocol No. 1; requiring him to exhaust domestic remedies in order to be able to obtain just satisfaction from the Court would prolong the procedure instituted by the Convention in a manner scarcely in keeping with the idea of effective protection of human rights (see *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 40, Series A no. 330-B).

B. Costs and expenses

26. The applicant claimed TRY 1,381.94 (equivalent to approximately EUR 650) for the costs and expenses incurred before the domestic courts, including the fees for experts' reports, and lawyers' fees. He submitted invoices in respect of these expenses.

27. The Government contested this amount.

28. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the full amount claimed by the applicant.

C. Default interest

29. 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. Holds

(a) that the respondent State is to pay the applicant's heirs, jointly, within three months of the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into Turkish liras at the rate applicable on the date of settlement:

(i) EUR 1,500,000 (one million five hundred thousand euros), plus any tax that may be chargeable, in respect of pecuniary damage;

(ii) EUR 650 (six hundred and fifty euros), plus any tax that may be chargeable to the applicant's heirs, 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;

2. Dismisses the remainder of the applicant's 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.

Stanley Naismith
Registrar

Françoise Tulkens
President