



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

SECOND SECTION

CASE OF AYANGİL AND OTHERS v. TURKEY

(Application no. 33294/03)

JUDGMENT
(Merits)

STRASBOURG

6 December 2011

FINAL

06/03/2012

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

In the case of Ayangil and Others v. Turkey,

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

Françoise Tulkens, *President*,

Danutė Jočienė,

Isabelle Berro-Lefèvre,

András Sajó,

Işıl Karakaş,

Paulo Pinto de Albuquerque,

Helen Keller, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 15 November 2011,

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

PROCEDURE

1. The case originated in an application (no. 33294/03) 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 four Turkish nationals, Ms Fidan Ayangil, Ms Fatma Ayangil, Mr Mehmet Ayangil and Ms Vildan Tatlı (Ayangil) (“the applicants”), on 2 September 2003.

2. The applicants were represented by Mrs S. Kutlay, a lawyer practising in Ankara. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicants alleged that the authorities’ interference with the peaceful enjoyment of their property had constituted a *de facto* expropriation and that their failure to compensate the damage resulting from the said interference had breached Article 1 of Protocol No. 1.

4. On 14 September 2007 the President of the Second Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1952, 1930, 1950 and 1957 respectively and live in Ankara.

6. On 24 October 1967 the authorities adopted a new local construction plan (*imar şuyulandırması*) and decided to merge plots nos. 8, 9, 10, 11, 12, 13, 14, 15 and 16 and to register them as plot no. 24 in the İncesu neighbourhood in the Çankaya district of Ankara. Previously the applicants' predecessors had been the owners of plot no. 9. Following the implementation of the said plan, the applicants' predecessors had kept a share measuring 480 square metres on plot no. 24 (which measures 5280 square metres in total), and owned a two-storey house on the plot in question. Given that the aforementioned decision designated plot no. 24 as a school area and indicated that the buildings on this plot would be expropriated, the applicants' predecessor, Mr İsmail Yılmaz, moved out of his house in 1969.

7. In a letter dated 26 March 1984 the deputy director of the Directorate of Education attached to the Ankara Governor's Office (hereinafter "the Directorate") sent a letter to the applicants' predecessors, informing them that their building would be expropriated since the Directorate was planning to build a primary school on the land on which it was situated. The Directorate also noted that a commission would proceed to the determination of the value of the applicants' building and its annexes.

8. Subsequently, the Directorate built the school. However, the Directorate did not conclude the expropriation proceedings for the applicants' building, which remained in the schoolyard.

9. On 19 April 1995 the applicants' predecessor filed a petition with the Directorate requesting the return of his plot of land, which had been occupied since the decision of expropriation in 1967 and the construction of the school. He noted that despite the expropriation decision, the authorities had done nothing despite continuing to occupy his plot of land and that this situation had restricted his right to the enjoyment of his property. He therefore asked the authorities to overturn the decision ordering expropriation. It is unknown whether the Directorate replied to the petition.

10. In 2000, after inheriting the property in question, the applicants brought an action seeking a declaratory judgment (*tespit davası*) before the Ankara Magistrates' Court to the effect that their building was situated in the schoolyard. The Magistrates' Court appointed an expert, who found that the building in question was indeed situated in the zone belonging to the İncesu Primary School.

11. The applicants brought an action before the Ankara Civil Court of First Instance against the Ankara Governor's Office for compensation. They submitted, *inter alia*, that the Directorate was in actual possession of their property, without having conducted expropriation proceedings, and had failed to compensate them for the damage resulting from the interference with their property.

12. In a letter dated 12 January 2001 the Directorate informed the Ankara Civil Court of First Instance that the İncesu primary school was

situated in block no. 8255, plot no. 24, and that the applicants owned a share of that plot measuring 480 out of a total of 5280 square metres. It noted further that, in the local building and settlement plan, plot no. 24 had been designated as a primary school zone and that the building and share of the land of the applicants had not been expropriated.

13. The Ankara Civil Court of First Instance appointed an expert, who conducted an on-site inspection. According to his report of 9 May 2001, the building in question was situated in the schoolyard.

14. On 23 May 2001 the First Instance Court partially granted the applicants' request for compensation and ordered the Ankara Governor's office to pay the applicants 99,976,950,917 Turkish liras (TRL)¹. Relying particularly on the annotations in the land registry and the response given by the Directorate as well as other evidence contained in the file, the court found it established that the administrative authorities were in actual possession of the applicants' property.

15. On 24 December 2001 the Court of Cassation quashed the judgment of 23 May 2001, considering that the Ankara Governor's office could not be considered to have been in actual possession of the applicants' building, since the administrative authorities had not prevented the applicants from using the building in question. The Court of Cassation further noted that the fact that the building was in the schoolyard did not necessarily mean that there had been a *de facto* expropriation, and concluded that the applicants' request should be dismissed. The case was remitted to the Ankara Civil Court of First Instance.

16. On 21 May 2002 the First Instance Court abided by the Court of Cassation's decision and dismissed the applicants' request. In its decision, the court noted that the school building and the building belonging to the applicants were both on plot no. 24, which was used by the applicants themselves. The court therefore found that there had not been a *de facto* expropriation even though plot no. 24 had been allocated to the primary school in the local building and settlement plan (*imar planı*).

17. On 4 November 2002 the Court of Cassation upheld the judgment of 21 May 2002.

18. On an unspecified date the applicants requested the rectification of the Court of Cassation's decision of 4 November 2002, claiming that there were clerical errors as well as errors of law in the decision.

19. On 6 May 2003 the Court of Cassation granted the applicants' request and decided to rectify the clerical errors.

20. In their observations, the applicants submitted that following the communication of the present to the Government, the authorities had brought road blocks to the school yard with a view to delimiting the school

1. Equivalent to 104,525 euros (EUR) at that time.

yard from the applicants' house. In this connection the applicants furnished photos taken on 3 April 2008.

21. In a letter dated 11 April 2008, furnished by the Government, the mayor of the neighbourhood (*muhtar*) stated that there were currently a number of tenants living in the applicants' house situated in the yard of the Incesu primary school.

II. RELEVANT DOMESTIC LAW AND PRACTICE

22. According to section 7 of the Expropriation Law no. 2942, as amended in 2001, when an expropriation decision was taken in respect of an immovable property, the administrative authorities shall inform the relevant land registry office for annotation of the said decision in the register. However, if the authority fails to furnish the land registry office, within six months of the annotation, with a document to be obtained from a court indicating that it had determined the price and requested the registration of the immovable property, the land registry office shall automatically remove the annotation.

23. Article 125 § 5 of the Constitution stipulates that the administrative authorities shall be liable to compensate for damage resulting from their actions and acts. Article 13 of Law no. 2577 on administrative procedure provides that any person who has suffered damage as a result of an act committed by the administrative authorities may request compensation from them. In the event of complete or partial rejection of a compensation request, or if no reply has been received within a time-limit of sixty days, the person involved may initiate administrative proceedings.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

24. The applicants complained that their inability to use their property had constituted an unjustified interference with their right to peaceful enjoyment of their possessions and that the authorities' failure to compensate them for the damage incurred had contravened Article 1 of Protocol No. 1 to the Convention, which reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest

and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

25. The Government contested that argument.

A. Admissibility

26. The Government submitted that the applicants had failed to exhaust domestic remedies in that they had failed to file an objection against the local construction and resettlement plan and to request its annulment before the administrative courts. Relying on the Court’s decision in the case of *Pınar Güngör v. Turkey* ((dec.), no. 46745/99, 6 March 2007), the Government contended that the applicants should also have brought another action in the administrative courts requesting the removal of the annotation in the register kept by the land registry office and that they should have claimed compensation for the alleged damage suffered by them in accordance with Article 13 of Law no. 2577. Finally, the Government contended that the applicants had not observed the six-month time-limit as they had failed to challenge the administrative decisions within the prescribed time-limits.

27. The applicants disputed the Government’s submissions and claimed that they had complied with the requirements of Article 35 § 1 of the Convention by taking their case to the highest level of jurisdiction and by lodging their application with this Court within six months of the final domestic decision.

28. The Court reiterates that the rule of the exhaustion of domestic remedies contained in Article 35 § 1 of the Convention is based on the assumption that there is an effective remedy available in respect of the alleged breach in the domestic system. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time; that is to say, that the remedy was accessible, was capable of providing redress in respect of the applicant’s complaints and offered reasonable prospects of success (see *V. v. the United Kingdom* [GC], no. 24888/94, § 57, ECHR 1999-IX).

29. The Court also emphasises that the application of the exhaustion of domestic remedies rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of

exhaustion is neither absolute nor capable of being applied automatically; in monitoring compliance with this rule, it is essential to have regard to the circumstances of the individual case. This means, amongst other things, that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the context in which they operate as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (see *İlhan v. Turkey* [GC], no. 22277/93, § 59, ECHR 2000-VII). It should also be reiterated that an applicant must have made normal use of domestic remedies which are likely to be effective and sufficient and that, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see *Riad and Idiab v. Belgium*, nos. 29787/03 and 29810/03, § 84, ECHR 2008-... (extracts)).

30. The Court will examine the Government's objections in the light of the above principles. As regards the Government's plea of non-exhaustion for failure to bring an action in the administrative court for the annulment of the local construction and resettlement plan, the Court considers that such an action could not have yielded any result in the present application, given that the applicants complained about restrictions which had negative consequences on the peaceful enjoyment of their possessions in the absence of any compensation, and not about the unlawfulness of the plan in question (see *Rossitto v. Italy*, no. 7977/03, § 19, 26 May 2009).

31. Concerning the Government's reference to an action in the administrative courts for the removal of the annotation in question, the Court notes that, under section 7 of the Expropriation Law, when the administration fails to complete expropriation within six months of the entry in the register of the annotation, the land registry office must *automatically* remove the annotation in question (see paragraph 22 above). If the land registry office fails to do so, the stake holders have the possibility to bring an action in the civil courts requesting the removal of the impugned annotation (see the Judgment of 18th Chamber of the Court of Cassation, on file no. 2005/5137 and decision no. 2005/7277, 11 July 2005). However, in the circumstances of the present case, even assuming that the applicants were successful in their action, this would not terminate the restriction in question given that the local construction plan of 24 October 1967 still foresees expropriation of the applicants' plot of land and designates the area as a school zone (see *Ziya Çevik v. Turkey*, no. 19145/08, § 43, 21 June 2011).

32. As to the Government's reliance on the *Pınar Güngör* decision (cited above), the Court considers that the circumstances of that case are different from those of the present case, given that in the former case the applicant's complaint solely pertained to damage resulting from the temporary occupation of her land by the authorities, whereas in the instant case the

applicants complained about their inability to use their plot of land and the restrictions imposed on the use of their property by the annotation in the land registry log book. Accordingly, having raised these complaints before the national courts, the applicants can be considered to have exhausted domestic remedies.

33. As regards the Government's objection concerning the six-month rule, the Court notes that the final domestic decision was given by the Court of Cassation on 6 May 2003 and that the applicants introduced their application on 2 September 2003, which was clearly within six months. It follows that the applicants have respected the six-month time-limit under Article 35 § 1 of the Convention.

34. In view of the above, the Court dismisses the Government's preliminary objections.

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

B. Merits

1. The parties' submissions

(a) The applicants

36. The applicants alleged that there had been a disproportionate interference with their right to peaceful enjoyment of their possessions as a result of the annotation in the land registry log book and designation of their property as a school zone. They noted that, as a result of the annotation in the land registry log book and the *de facto* occupation of their plot of land, they had been unable to use or sell their property and that the damage incurred had not been compensated by the national authorities.

(b) The Government

37. The Government submitted that there had been no interference with the applicants' right to peaceful enjoyment of their possessions given that they had not been deprived of their property and that they had been able to continue to use it after the implementation of the urban plan in question.

2. The Court's assessment

38. The Court must first determine whether the applicants can complain of an interference with their right to peaceful enjoyment of their possessions and, if so, whether the interference was justified.

(a) The existence of an interference with the applicants' right of property

39. The Court notes that following the adoption of a new local construction plan, the applicants' plot of land became part of plot no. 24, and was designated as a school zone by an annotation entered in the land registry log book. In 1984 the authorities informed the applicants that they would expropriate their plot of land and house, pursuant to the decision dated 24 October 1967, with a view to constructing a school on the plot in question (see paragraphs 6 and 7 above).

40. However, despite the eventual construction of the school, the authorities did not expropriate the applicants' plot of land, but used part of it as a school yard (see paragraph 8 above). Although the expropriation decision and the use of part of the land left intact in law the applicants' right to use their possessions, this situation in practice significantly reduced the possibility of its exercise. It has also affected the very substance of ownership as a result of the annotation in the land registry logbook and the restriction of the applicants' right to use their possessions.

41. The applicants' right of property thus became precarious and defeasible over a long period of time (see *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 60, Series A no. 52). There was therefore an interference with the applicants' right of property. It remains to be ascertained whether the interference in question breached Article 1 of Protocol No. 1.

(b) The justification for the interference with the applicants' right of property

42. The Court reiterates that Article 1 of Protocol No. 1 comprises three distinct rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, *inter alia*, to control the use of property in accordance with the general interest. The three rules are not, however, distinct in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, among other authorities, *Bruncrona v. Finland*, no. 41673/98, §§ 65-69, 16 November 2004, and *Broniowski v. Poland* [GC], no. 31443/96, § 134, ECHR 2004-V). The Court must next determine the applicable rule.

43. In the instant case, as noted above, the authorities did not proceed to an expropriation of the applicants' property. The applicants were therefore not formally "deprived" of their possessions at any time.

44. Nonetheless, even in the absence of a formal expropriation, that is to say, a transfer of ownership, the Court must look behind appearances and

investigate the realities of the situation complained of (*Sporrong and Lönnroth*, cited above, § 36, and *Van Droogenbroeck v. Belgium*, 24 June 1982, § 38, Series A no. 50; see also *Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32).

45. In this connection, the Court observes that all the effects complained of by the applicants stemmed from the reduction of the possibility of disposing of the property concerned. Those effects were occasioned by limitations imposed on the right of property, namely, the designation of the applicants' plot of land as a school zone, and from the consequences of those limitations on the value of their house. However, although the right in question lost some of its substance, it did not disappear.

46. The applicants could continue to utilise their possessions and, although it became more difficult to sell their property on account of the use of part of their land as the school yard, the possibility of selling or renting it remained. Indeed, it appears from the letter of the local mayor that the applicants' house is currently rented out (see paragraph 21 above).

47. In these circumstances, the second sentence of the first paragraph of Article 1 of Protocol No. 1 does not apply in the present case (see *Scordino v. Italy (no. 2)*, no. 36815/97, § 71, 15 July 2004, and *Matos e Silva, Lda., and Others v. Portugal*, 16 September 1996, § 85, *Reports of Judgments and Decisions* 1996-IV).

48. Furthermore, given that the expropriation decision and the annotation in the land registry log book were not intended to limit or control the use of the property, since they were an initial step in a procedure leading to deprivation of possessions, they did not fall within the ambit of the second paragraph. Accordingly, the restriction complained of by the applicants must be examined under the first sentence of the first paragraph (see *Sporrong and Lönnroth*, cited above, § 65; *Erkner and Hofbauer v. Austria*, 23 April 1987, § 74, Series A no. 117; *Elia S.r.l. v. Italy*, no. 37710/97, § 57, ECHR 2001-IX; *Scordino (no. 2)*, cited above, § 73; and *Köktepe v. Turkey*, no. 35785/03, § 85, 22 July 2008).

49. It now needs to be ascertained whether the interference in question struck a fair balance between the interests of the applicant and those of society as a whole (*Phocas v. France*, 23 April 1996, § 53, *Reports* 1996-II).

50. In determining whether this requirement has been met, the Court recognises that in an area as complex and difficult as that of the development of large cities, the State enjoys a wide margin of appreciation in order to implement their town-planning policy. Nevertheless, the Court cannot abdicate its power of review and must determine whether the requisite balance was maintained in a manner consonant with the applicants' right to the peaceful enjoyment of their possessions, within the meaning of the first sentence of Article 1 of Protocol No. 1 (see *Sporrong and*

Lönnroth, cited above, § 69, and *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 93, ECHR 2005-VI).

51. In this respect, the Court notes that although the authorities commenced expropriation procedure with a view to constructing a school on the plot in question, they failed to do so within the time-limit prescribed by the domestic law. Nor did they remove the annotation entered in the land registry log book. Even after the construction of the school no steps were taken to complete the expropriation procedure. The Directorate continued to occupy the applicants' land by allocating it to the primary school. As established by the Ankara Magistrates' Court and the Ankara Civil Court of First Instance, the applicants' house is currently situated in the schoolyard and the administration is in possession of the applicants' plot of land (see paragraphs 10, 13 and above). The applicants' predecessors' attempts to overturn the authorities' decision of expropriation and to regain their property did not yield any result (see paragraph 9 above). Thus, the applicants were left in a state of uncertainty as to the fate of their property over a long period of time.

52. The compensation proceedings brought by the applicants did not yield any result either, since the national courts concluded that the requisite conditions of admissibility for *de facto* expropriation had not been met because the applicants were still able to use their house situated in the schoolyard (see paragraphs 15-17 above).

53. While the Court sees no reason to depart from the national courts' finding that the interference at issue cannot be regarded as a *de facto* expropriation, since it is primarily a supervisory body and subsidiary to the national systems safeguarding human rights (see *García Ruiz v. Spain* [GC], no. 30544/96, §§ 28-29, ECHR 1999-I), it considers that the lack of any domestic remedy to afford the applicants redress for the occupation of their plot of land and the depreciation in value of their house impaired their full enjoyment of their right to property.

54. In this connection, the Court notes that the Government did not cite any exceptional circumstances to justify the total lack of compensation for the interference in question, even though the domestic legislation stipulates that the administration shall be liable to compensate for damage resulting from its actions and acts (see paragraph 23 above).

55. In view of the above, the Court considers that the failure to award any compensation to the applicants upset, to their detriment, the fair balance which has to be struck between the protection of property and the requirements of the general interest (see *Sporrong and Lönnroth*, cited above, §§ 73 and 74). There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. 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

57. The applicants claimed 350,000 euros (EUR) in respect of pecuniary damage and EUR 200,000 for non-pecuniary damage for the stress and anxiety suffered by them over a long period of time. As regards the costs and expenses, the applicants claimed EUR 2,500 for the expenses they incurred in the course of their struggle before the domestic courts.

58. The Government submitted that the amounts claimed by the applicant were speculative and unsubstantiated.

59. In the circumstances of the case, the Court considers that the question of the application of Article 41 is not ready for decision and must be reserved, due regard being had to the possibility of an agreement between the respondent State and the applicant.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
3. *Holds* that the question of the application of Article 41 of the Convention is not ready for decision, and accordingly,
 - (a) *reserves* the said question;
 - (b) *invites* the Government and the applicants to submit, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
 - (c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 6 December 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Françoise Tulkens
President