



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

SECOND SECTION

**CASE OF KAMOY RADYO TELEVİZYON YAYINCILIK VE
ORGANİZASYON A.Ş. v. TURKEY**

(Application no. 19965/06)

JUDGMENT

*This version was rectified on 14 May 2019
under Rule 81 of the Rules of Court*

STRASBOURG

16 April 2019

FINAL

09/09/2019

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

**In the case of Kamoy Radyo Televizyon Yayincılık ve Organizasyon
A.Ş. v. Turkey,**

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

Robert Spano, *President*,

Paul Lemmens,

Işıl Karakaş,

Julia Laffranque,

Valeriu Griţco,

Ivana Jelić,

Darian Pavli, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 19 March 2019,

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

PROCEDURE

1. The case originated in an application (no. 19965/06) 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 company registered in Turkey, Kamoy Radyo Televizyon Yayincılık ve Organizasyon A.Ş. (“the applicant company”), on 20 April 2006.

2. The applicant company was represented by Mr Z. Erkan, a lawyer practising in Ankara. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicant company alleged a violation of its property rights and its right to a fair trial, arguing that its use of its registered trademark had been unlawfully restricted by legislative interference in pending court proceedings.

4. On 4 September 2009 the Government were given notice of the application.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant is a media company with its registered office in Ankara.

6. On 5 November 1998 Kamoy Araştırma Siyasi Danışmanlık ve Yayincılık A.Ş. (hereinafter “Kamoy Araştırma”), a company affiliated with

the applicant company, applied to the Turkish Patent Institute (*Türk Patent Enstitüsü*) for registration of the trademark “Özlenen Gazete Vatan, Günlük Siyasi Gazete” (Homeland: The newspaper we longed for). On 5 November 1998 the trademark was registered in the name of the company for a period of ten years.

7. In February and March 1999 Kamoy Araştırma published a newspaper entitled *Özlenen Gazete Vatan*. In March 1999 it halted the publication of the newspaper owing to financial reasons.

8. On 4 September 2002, Bağımsız Gazetecilik Yayıncılık A.Ş. (hereinafter “Bağımsız Gazetecilik”), another company operating in the media sector, began publishing a newspaper called *Vatan*.

A. Proceedings brought by the applicant company

9. On 22 October 2002, Kamoy Araştırma brought a case against Bağımsız Gazetecilik before the Istanbul Intellectual Property Court, requesting the suspension of the latter’s use of its registered trademark, which according to it constituted unfair competition. It argued, *inter alia*, that the other party was using the same name for the same product, namely a newspaper, without having obtained any prior permission, despite the fact that it had the rights to the registered trademark which needed to be protected pursuant to Legislative Decree no. 556 on the Protection of Trademarks.

10. During the course of the proceedings the trademark was transferred to the applicant company, which subsequently became a party to the proceedings.

11. On 18 August 2003 an expert report assessing both parties’ rights as regards the name at issue was submitted to the court. It noted that while the applicant company had indeed registered the name “Vatan”, which was common to both newspapers, Bağımsız Gazetecilik had the “declaration of intention to publish a periodical” (*mevkute beyannamesi* – hereinafter “declaration of a periodical”) dated 1974, which allowed it to publish with that name. The report pointed out that the newspaper *Vatan* had been published since 1975 and that the name had become recognisable long before the applicant company had applied for registration. In that connection, the report noted that in view of the last paragraph of Article 7 of Legislative Decree no. 556, which made reference to the recognisability of a trademark, it should be accepted that it was Bağımsız Gazetecilik that had actually made the name a recognised brand. It concluded accordingly that the Patent Institute should have refused the applicant company’s request for registration pursuant to Article 7 of Legislative Decree no. 556.

12. On 27 January 2004 the Istanbul Intellectual Property Court dismissed the applicant company’s claim. The court noted that the newspaper *Vatan*, the rights to which had been transferred to Bağımsız

Gazetecilik in 2002, had been published since 1975. In line with the findings of the expert report, it held that the name “Vatan” had become well-known as a newspaper prior to the applicant company’s application for its registration as a trademark and that the applicant company, whose application should actually have been rejected by the Patent Institute, could not be considered to have brought the case in good faith. The court furthermore stated that in any event the use of the name by the defendant party was protected by section 31(2) of the Turkish Patent Institute Act (Law no. 5000 on the Establishment and Duties of the Turkish Patent Institute), which had come into force on 6 November 2003 during the course of the proceedings and set forth that those who publish periodicals could not be prevented from doing so on the basis of Legislative Decree no. 556.

13. The applicant company appealed against the judgment. It argued that the “declaration of a periodical” mentioned in the expert report was simply an official recognition of an application to publish a periodical and did not have any priority over a registered trademark. Noting that its rights to the trademark at issue were still valid, it argued that Turkish law provided for the absolute protection of a registered trademark. The applicant company also challenged the application of section 31(2) of the Turkish Patent Institute Act to its case, stating that the said regulation had entered into force after it had lodged its case. It argued that the provision did not have a legitimate aim and paved the way for everyone to publish newspapers with the same name.

14. On 6 May 2005 the Court of Cassation upheld the judgment on the basis of the second reasoning relied on by the Intellectual Property Court. The appellate court pointed out that according to the additional paragraph of Article 7 of Legislative Decree no. 556, the application for the registration of a trademark which had previously been recognisable – in this case, the application for registration lodged by the defendant party (see paragraphs 18-23 below) – could not be rejected. It found that despite that provision, since the applicant company had already registered the trademark, it would have priority over an unregistered trademark, albeit a recognisable one. Accordingly, the appellate court concluded that the first reasoning of the court, which gave priority to the unregistered trademark, could not be accepted. It noted, however, that the case should in any event be dismissed pursuant to section 31(2) of the Turkish Patent Institute Act.

15. The applicant company applied for rectification of that judgment, arguing that the retrospective application of section 31(2) of the Turkish Patent Institute Act put the other party in a privileged position. In that connection, it maintained that had the Intellectual Property Court ruled on its case within one year of it having been lodged, it would have been able to prevent the unlawful use of its trademark.

16. On 28 October 2005 the Court of Cassation rejected the applicant's rectification application.

17. On 31 January 2008, in examining the matter in relation to a separate case, the Turkish Constitutional Court annulled section 31(2) of the Turkish Patent Institute Act, finding that it did not comply with Article 35 of the Constitution, which guaranteed the right to property. After having established that a trademark constituted a possession, the Constitutional Court stated that Legislative Decree no. 556 was aimed at protecting registered trademarks from unlawful interferences and that the provision at issue made it impossible to exercise that protection as regards unlawful interferences which had already started by its entry into force. It concluded accordingly that such a restriction of trademark rights, which resulted in the protection of unlawful acts, was not in the public interest.

B. Proceedings brought by the other party

18. On 24 September 2002 Bağımsız Gazetecilik applied for the registration of the name "Vatan" as a trademark. The Patent Institute rejected the application on account of the already existing registration in the applicant company's name.

19. On an unspecified date Bağımsız Gazetecilik objected to the decision of the Patent Institute.

20. On 8 December 2003 the Patent Institute imposed a provisional measure on the trademark, restricting its transfer to third parties.

21. On 7 February 2005 the Patent Institute accepted the objection of Bağımsız Gazetecilik and decided to register the name "Vatan" in its name for publishing services.

22. In the meantime, on 2 April 2004 Bağımsız Gazetecilik had initiated proceedings against the applicant company for the annulment of the latter's registered trademark.

23. On 17 February 2005 the Ankara Intellectual Property Court ruled that the registration in the name of the applicant company be declared void, finding that *Vatan* had become well-known as a newspaper before the applicant company's registration. The court also held that the applicant company had not used the trademark for a period of five years, which was a reason for annulment of a trademark under Article 14 of Legislative Decree no. 556. That judgment became final by a decision of the Court of Cassation on 12 June 2006.

24. On 11 August 2006 the trademark for the name "Vatan" was registered in the name of Bağımsız Gazetecilik.

25. On 9 November 2006 the applicant company's trademark registration was removed from the register of the Patent Institute.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

26. The relevant articles of Legislative Decree no. 556 on the Protection of Trademarks, which was repealed by the Intellectual Property Act (Law no. 6769) of 22 December 2016, read as follows:

Article 1

“The purpose of the present Legislative Decree is to provide for the protection of trademarks which have been registered in line with its provisions.”

Article 6

“The protection afforded to trademarks by the present Legislative Decree [can only] be obtained by registration.”

Article 7

“The signs listed below cannot be registered as a trademark:

...

(b) Trademarks which are indistinguishable from a trademark which has already been registered or awaiting registration and concerns the same product or service;

...

(Additional paragraph as entered into force in 1995) If a trademark has been used before the date of registration and has acquired recognition as regards the products or services subject to that registration, its registration cannot be rejected on the basis of paragraphs (b), (c) and (d) of this Article.”

Article 9

“The rights arising from the registration of a trademark solely belong to the owner of that trademark. The owner may request prevention of the below acts:

(a) The use of any sign which is the same as the registered trademark and concerns the same product and/or service as that the trademark was registered for.

...”

Article 14 (annulled by the Constitutional Court on 14 December 2016)

“The trademark shall be annulled if it is not used within five years after its registration without there being any justification or if its use is suspended for five consecutive years.

...”

Article 42

“A registered trademark shall be declared invalid by the competent court in the following cases:

(a) If the trademark is one of the signs listed in Article 7;

...

(c) (annulled by the Constitutional Court on 9 April 2014) If there is a breach of Article 14;

...”

Article 44

“The decision of invalidity shall have retroactive effect.

...”

Article 61

“The acts listed below shall constitute a violation of trademark rights:

(a) Violation of Article 9;

(b) Imitating the trademark by using the same trademark or an indistinguishable trademark without prior authorisation of that trademark’s owner;

...”

Article 62

“The owner of a trademark whose rights are violated may request the [measures] below from the court:

(a) Suspension of the acts violating his or her trademark rights;

(b) Reparation of the violation and pecuniary and non-pecuniary compensation;

...”

27. Section 31(2) of the Turkish Patent Institute Act (Law no. 5000 on the Establishment and Duties of the Turkish Patent Institute of 6 November 2003), which was annulled by the Turkish Constitutional Court on 31 January 2008, read:

“Those who publish periodicals in accordance with the Press Act [Law no. 5680] at the time this Law enters into force cannot be prevented from publishing their periodicals owing to the provisions of Legislative Decree no. 556 on the Protection of Trademarks.”

28. The relevant part of Article 6 *bis* of the Paris Convention of 20 March 1883 for the Protection of Industrial Property, which was described in the Court’s judgment in the case of *Anheuser-Busch Inc. v. Portugal* ([GC], no. 73049/01, § 28, 11 January 2007) reads as follows:

“(1) The countries of the Union undertake, ... [*ex proprio motu*] if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith.

...”

Under section 13(1)(d) the Turkish Patent Institute Act, which was repealed in 2018, the Turkish Patent Institute determined the list of well-known trademarks mentioned in Article 6 *bis* of the Paris Convention.

THE LAW

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

29. The applicant company complained that the domestic court's retrospective application of legislation which had specifically aimed to protect the party unlawfully using its trademark had unlawfully restricted its use of its property, specifically its registered trademark. It alleged a violation of its rights under Article 6 of the Convention and Article 1 of Protocol No. 1 to the Convention.

30. The Government contested that argument.

31. The Court considers that this complaint should be examined under 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.”

A. Admissibility

32. The Government raised an objection as regards the exhaustion of domestic remedies, arguing that the applicant company should have initiated compensation proceedings before the administrative courts following the registration of the impugned trademark in the name of the other party, in accordance with Article 125 of the Constitution, which provided that the administration was liable to pay compensation for damage arising from its own actions.

33. The Court reiterates 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 *Kozacıoğlu v. Turkey* [GC], no. 2334/03, § 40, 19 February 2009). In the present case, the applicant company brought proceedings for the prevention of the unauthorised use of its registered trademark and requested the protection of its related rights. Its claim was dismissed by the domestic court, which found that the defendant party could use the trademark. On the other hand, a counterclaim lodged by the other party was accepted and the applicant company's trademark registration was annulled. In these circumstances, the Court considers that the applicant company could not have been expected to

initiate proceedings for compensation against the domestic authorities on account of their annulment of its trademark registration, as such a case did not offer reasonable prospects of success. In that connection, it notes that that annulment had been made on the basis of the Ankara Intellectual Property Court's judgment dated 17 February 2005, which concluded that the applicant company had failed to use the trademark for five consecutive years and that accordingly, the condition for annulment of a trademark registration under Article 14 of Legislative Decree no. 556 had been met. Moreover, as noted below (see paragraph 47 below), the applicant company's complaint does not concern the annulment of its trademark but its unlawful use by a third party, for which it brought a case before the competent domestic court. The Court therefore concludes that the applicant company has complied with the requirement of exhaustion of domestic remedies. It consequently rejects the Government's objection in this respect.

34. The Court 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. The parties' submissions

35. The applicant company contended that the retrospective application of section 31(2) of the Turkish Patent Institute Act, which had later been annulled by the Constitutional Court, had stripped the protection afforded to its trademark by Legislative Decree no. 556 of all meaning. That provision had constituted interference by the legislature, in that it had entered into force in order to resolve the case in favour of the other party, a powerful media group. Moreover, the other newspaper, *Vatan*, had not been published between 1977 and 2002 and could not have been considered a well-known trademark as alleged by the domestic authorities.

36. The Government argued that there had been no interference with the applicant company's property rights. In that connection they referred to the Court's *Anheuser-Busch Inc.* judgment (cited above), alleging that the applicant company had a conditional right and that it should have been aware that its request might be turned down by the authorities, as its application for a trademark had concerned a well-known word, which had already been in use since 1975. In that connection, they maintained that although the protection provided to a trademark was obtained by registration, there were a number of exceptions to that principle, such as Article 6 *bis* of the Paris Convention. They also stated that by the time Bağımsız Gazetecilik had lodged an application with the Ankara Intellectual Property Court, the applicant company had not been using the trademark for

five consecutive years. Accordingly the domestic court's judgment, which had annulled the registration of the trademark in the name of the applicant company, had been in compliance with the law, specifically Article 14 of Legislative Decree no. 556. The Government maintained that the interference in question had been both in the public interest and proportionate. Lastly, in relation to the retrospective application of the Turkish Patent Institute Act, the Government stated that Article 76 of the Code of Civil Procedure as in force at that time (Law no. 1086) provided that judges should deliver their judgments *ex proprio motu*, in accordance with Turkish law. They argued that accordingly the civil courts and the Court of Cassation should deliver their decisions taking account of the Laws that were in force at the time of those decisions.

2. The Court's assessment

(a) Whether the applicant company had a possession

37. The Court reiterates that Article 1 of Protocol No. 1 is applicable to intellectual property as such (see *Anheuser-Busch Inc.*, cited above, § 72). In the present case, the applicant company was the owner of a registered trademark which had been recognised by the domestic authorities. Therefore, unlike in the judgment of *Anheuser-Busch Inc.* (cited above), there was no dispute in the present case as to whether it could claim protection of its intellectual property rights. Accordingly, the applicant company had a right recognised by law and not merely a legitimate expectation of obtaining a property right as alleged by the Government (compare *Balan v. Moldova*, no. 19247/03, § 34, 29 January 2008).

38. In view of the above, the Court concludes that the applicant company had a "possession" within the meaning of Article 1 of Protocol No. 1 to the Convention. It must now examine whether there has been interference with its right to the peaceful enjoyment of its possessions.

(b) Whether there has been interference

39. The applicant company complained about a violation of its right to peaceful enjoyment of its trademark on account of the entry into force and retrospective application of a piece of legislation, namely section 31(2) of the Turkish Patent Institute Act, which it asserted had rendered the protection afforded to its trademark by Legislative Decree no. 556 illusory.

40. The Court reiterates that, in certain circumstances, the retrospective application of legislation whose effect is to deprive someone of a pre-existing "asset" that was part of his or her "possessions" may constitute interference that is liable to upset the fair balance that has to be maintained between the demands of the general interest on the one hand and the protection of the right to peaceful enjoyment of possessions on the other (see, among other authorities, *Maurice v. France* [GC], no. 11810/03, §§ 90

and 93, ECHR 2005-IX). This also applies to cases in which the dispute is between private individuals and the State is not itself a party to the proceedings (see *Lecarpentier v. France*, no. 67847/01, §§ 48, 51 and 52, 14 February 2006; see also, in connection with Article 6 of the Convention, *Cabourdin v. France*, no. 60796/00, §§ 28-30, 11 April 2006).

41. In the present case, the Court holds that the retrospective application of section 31(2) of the Turkish Patent Institute Act, which entered into force during the course of the proceedings brought by the applicant company, is indisputable¹ (contrast *Anheuser-Busch Inc.*, cited above, § 84, where whether the legislation had retrospectively been applied was in itself in issue; in that case the Court found that it had not been established whether the applicant company had had a right of priority in respect of the “Budweiser” trademark when the Bilateral Agreement, which had been alleged to have been applied retrospectively, had come into force). In that connection, it observes first of all that under Legislative Decree no. 556, in particular Articles 1, 6 and 61, the applicant company had a right of priority as the owner of the trademark. Moreover, the applicant company’s right of priority was recognised by the Court of Cassation which ruled that even assuming that the other party had used the brand for a long time and made it a recognisable trademark, it could not be accepted to have had priority over the applicant company, which had registered the trademark in its name (see paragraph 14 above).

42. In these circumstances, the Court finds that the application of section 31(2) of the Turkish Patent Institute Act in the applicant company’s case constituted an interference with its property rights within the meaning of Article 1 of Protocol No. 1 to the Convention.

43. As for the applicable rule, the Court refers to its established case-law with regard to the structure of Article 1 of Protocol No. 1 and the three rules contained therein (see, among other authorities, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, § 98, ECHR 2014).

44. In the present case the Court considers that the alleged violation of the right of property resulting from the retrospective application of the Turkish Patent Institute Act cannot be classified in a precise category. The case should therefore more appropriately be examined in the light of the general rule laid down in the first sentence of the first paragraph of Article 1 of Protocol No. 1.

(c) Whether the interference was justified

45. It is not disputed that the interference complained of was lawful, as required by Article 1 of Protocol No. 1. On the other hand, the parties disagreed about the legitimacy of that interference. The Court must

1. Rectified on 14 May 2019: the text was “(...) is not indisputable (...)”.

accordingly determine whether it pursued a legitimate aim, in other words whether there was a “public interest”, and whether it complied with the principle of proportionality.

46. The general principles regarding the legitimate aim in the public interest and “fair balance” were outlined in the Court’s *Broniowski v. Poland* judgment ([GC], no. 31443/96, §§ 148-51, ECHR 2004-V).

47. The Court notes at the outset that the applicant company’s complaint relates solely to the unlawful use of its registered trademark by a third party and the domestic authorities’ failure to protect its right of priority over that trademark, which it claimed had prevented it from using the trademark in competition with a more powerful media group. Accordingly, the Court cannot give weight to the Government’s argument that the trademark was eventually annulled as it had not been used by the applicant company for five consecutive years, as the applicant company’s complaint does not concern that annulment but the restriction of its use of the trademark during that five-year period. In that connection, the Court notes that the said period, which was described in Article 14 of Legislative Decree no. 556 as a reason for annulment of a registration, had not expired when the impugned interference – the entry into force and application of the Turkish Patent Institute Act – occurred. Although it had been more than five years since the applicant company’s last use of the trademark when the Court of Cassation delivered its decision during the first set of proceedings, that court did not make any mention of that fact in its reasoning and relied solely on section 31(2) of the Turkish Patent Institute Act in dismissing the applicant company’s case.

48. The Court observes that section 31(2) of the Turkish Patent Institute Act was annulled by the Constitutional Court’s judgment of 31 January 2008. The Constitutional Court found that the regulation, which rendered the protection of trademarks as provided by Legislative Decree no. 556 meaningless, had not been in the public interest and had violated the right to property (see paragraph 17 above).

49. The Court takes into consideration the judgment of the Constitutional Court and acknowledges its reasoning (see, *mutatis mutandis*, *Börekçiogulları (Çökmez) and Others v. Turkey*, no. 58650/00, § 41, 19 October 2006).

50. In the absence of any argument raised by the Government as regards the legitimate aim pursued by the entry into force of the regulation at issue, the Court considers that the legislative intervention complained of by the applicant company, which definitively settled, in a retroactive manner, the substance of the dispute between the applicant company and the rival media group before the domestic courts, does not appear to have been justified by any grounds of general interest, as required, in particular, by the principle of the rule of law (see *Lecarpentier*, cited above, § 48).

51. In these circumstances, the Court concludes that the Government have not demonstrated that the interference with the applicant company's property served a "public interest" (see, *a contrario*, *Petro-M SRL and Rinax-TVR SRL v. Moldova* (dec.), no. 44787/05. § 22, 28 February 2017).

52. There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

53. 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

54. The applicant company claimed 4,000,000 euros (EUR) in respect of pecuniary and EUR 500,000 in respect of non-pecuniary damage. In support of its claim for non-pecuniary damage, it maintained that the newspaper *Vatan*, which had been published by the other party in violation of its trademark rights, had been sold to another media group for 18,000,000 United States dollars in 2007.

55. The Government contested these claims, considering the requested amounts unsubstantiated and excessive. As regards the pecuniary damage, they noted that the speculative calculations made by the applicant company could not be taken as reference as the latter had failed to support its claims by any evidence concerning its loss.

56. The Court notes that the applicant company's claim in respect of pecuniary damage is not supported by any evidence whatsoever and that it failed to show that the trademark in question possessed a definite financial value during the time it was registered in its name (contrast *Anheuser-Busch Inc.*, cited above, § 76). It therefore rejects its claim under this head. On the other hand, it awards the applicant company EUR 1,500 in respect of non-pecuniary damage (see *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 221, ECHR 2012; see also *Boyadzhieva and Gloria International Limited EOOD v. Bulgaria*, nos. 41299/09 and 11132/10, § 62, 5 July 2018; and *Tiramavia S.R.L. and Others v. the Republic of Moldova*, nos. 54115/09 and 2 others, § 47, 4 September 2018).

B. Costs and expenses

57. The applicant company also claimed EUR 20,000 for the costs and expenses incurred before the domestic courts and the Court.

58. The Government contested that claim.

59. 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. Furthermore, Rule 60 §§ 2 and 3 of the Rules of Court requires the applicant to submit itemised particulars of all claims, together with any relevant supporting documents, failing which the Court may reject the claims in whole or in part. In the present case, noting that the applicant company did not produce any documents in support of its claim, the Court decides to dismiss it in its entirety (see *Paksas v. Lithuania* [GC], no. 34932/04, § 122, ECHR 2011 (extracts)).

C. Default interest

60. 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*, by a majority, the application admissible;
2. *Holds*, by six votes to one, that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
3. *Holds*, by six votes to one,
 - (a) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage to be converted into Turkish liras 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 applicant company's claim for just satisfaction.

Done in English, and notified in writing on 16 April 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Robert Spano
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Lemmens is annexed to this judgment.

R.S.
S.H.N.

DISSENTING OPINION OF JUDGE LEMMENS

61. To my regret, I am unable to join the majority in finding that there has been a violation of Article 1 of Protocol No. 1. In my opinion, the application should have been declared incompatible *ratione materiae* with the Convention and its protocols.

2. The case concerns proceedings initially brought before the Turkish courts by Kamoy Araştırma on 22 October 2002 against the use of the name “Vatan” by Bağımsız Gazetecilik for a newspaper that the latter had started to publish on 4 September 2002. This claim was based on the claimant company’s registered trademark “Özlenen Gazete Vatan” (see paragraph 9 of the judgment). In the course of the proceedings, that trademark was transferred to the applicant company, which became a party to the proceedings (see paragraph 10 of the judgment).

The claim was dismissed by the Istanbul Intellectual Property Court (on 27 January 2004; see paragraph 12 of the judgment), and that decision was upheld by the Court of Cassation (on 6 May 2005; see paragraph 16 of the judgment). The only ground retained by the Court of Cassation to justify the dismissal was section 31(2) of Law no. 5000 of 6 November 2003 on the Establishment and Duties of the Turkish Patent Institute, which shielded publishers of periodicals from trademark claims.

3. Parallel to these proceedings, there were also proceedings brought on 2 April 2004, five years after Kamoy Araştırma had stopped publishing a newspaper under the name “Özlenen Gazete Vatan”, by Bağımsız Gazetecilik against the applicant company. In these proceedings, Bağımsız Gazetecilik requested the annulment of the applicant company’s registered trademark (see paragraph 22 of the judgment).

On 17 February 2005, the Ankara Intellectual Property Court upheld the claim and declared the registration of the applicant company’s trademark “Özlenen Gazete Vatan” void, on two grounds: the name “Vatan” was already well-known before the name “Özlenen Gazete Vatan” was registered, and the trademark “Özlenen Gazete Vatan” was not used for five years since its registration (Article 14 of Legislative Decree no. 556 of 24 June 1995 on the Protection of Trademarks) (see paragraph 23 of the judgment). As a consequence, the court annulled the registration of the trademark “Özlenen Gazete Vatan”.

For reasons unknown, in its above-mentioned judgment of 6 May 2005 in the first proceedings, the Court of Cassation failed to mention this decision.

On 12 June 2006, after the applicant company had filed its application with the European Court, the Court of Cassation dismissed the applicant company's appeal against the above-mentioned decision of the Ankara Intellectual Property Court (see paragraph 23 of the judgment).

On 9 November 2006, following the Court of Cassation's judgment of 12 June 2006, the applicant company's trademark "Özlenen Gazete Vatan" was removed from the register of trademarks (see paragraph 25 of the judgment).

4. The first question to be answered in this case is whether the applicant company had a "possession" within the meaning of Article 1 of Protocol No. 1.

The majority consider that this is indeed the case, taking into account that "the applicant company was the owner of a registered trademark which had been recognised by the domestic authorities" (see paragraph 37 of the judgment). They continue to hold that "there was no dispute in the present case as to whether (the applicant company) could claim protection of its intellectual property rights" (ibid.).

I respectfully disagree with this assessment of the facts.

5. To begin with, the majority disregard the fact that the applicant company's registered trademark has been declared void by the Ankara Intellectual Property Court, which judgment has been confirmed by the Court of Cassation and followed by the effective removal of that trademark from the Patent Institute's register.

The decision of the Ankara Intellectual Property Court was not based on section 31(2) of Law no. 5000, and therefore is not exposed to the criticism made by the majority against that provision in its examination of the merits of the applicant company's complaint (see in particular paragraphs 48-50 of the judgment).

I therefore find it difficult to hold, as the majority do, that the applicant company was the holder of a registered trademark. Yes, that was initially the case. But it was no longer the case after the competent courts held that the trademark registration was null and void.

6. Moreover, as is further acknowledged by the majority (see paragraph 47 of the judgment), the Government explicitly relied on the annulment of the applicant company's registered trademark, in particular on the grounds that it had not been used for five years, to conclude that there had been no "interference" with the applicant company's right to a trademark.

I note in passing that in their observations, the Government referred to Article 44 of Legislative Decree no. 556, relating to the effects of a "declaration of invalidity" of a trademark. Article 44 not only provided that such a declaration had a retrospective effect (see paragraph 7, below), but also that it had an effect "*erga omnes*" (Article 44, third paragraph, of Legislative Decree no. 556). I assume that that rule, or a similar rule, applies also to the annulment of a trademark.

In any event, given the above, I find it difficult to hold, as the majority do, that "there was no dispute" as to whether the applicant company could claim the protection of its trademark rights. In my opinion, the Government clearly argued that it could not.

7. It is true that the majority dismiss the Government's argument on the grounds that "the applicant company's complaint does not concern (the annulment of its trademark) but the restriction of its use of the trademark during (the five-year period between April 1999 and March 2004)" (see paragraph 47 of the judgment).

I confess that I do not see the point. The applicant company complained about the dismissal of its claim relating to the use of the name "Vatan" by Bağımsız Gazetecilik, which claim was based on its registered trademark "Özlenen Gazete Vatan". When the Government raised the defence, before this Court, that the latter trademark had subsequently been annulled, it was for the applicant company to argue why that event had no bearing on its application. The applicant company, however, failed to do so, merely reiterating in its reply to the Government's observations that it could not use its trademark because of the use of a similar name by Bağımsız Gazetecilik and that its trademark rights had not been sufficiently protected by the competent authorities.

8. The proceedings before the Court have not clarified whether the annulment of the applicant company's trademark had a retrospective effect or solely a prospective effect. I note, however, that a "declaration of invalidity" would have had a retrospective effect (see Article 44, first paragraph, of Legislative Decree no. 556, quoted in paragraph 26 of the judgment). Even if the annulment of the applicant company's trademark only had a prospective effect, that is from the date of the final decision in

the proceedings brought by Bağımsız Gazetecilik (12 June 2006), the annulment would still have to be an element to be taken into account in our assessment of whether the applicant company had a “possession” within the meaning of Article 1 of Protocol No. 1.

On the basis of the judgment of the Ankara Intellectual Property Court of 17 February 2005, it seems to me that one must conclude that the applicant company did not have a right protected under Article 1 of Protocol No. 1. Indeed, according to that judgment, the applicant company did not have a validly registered trademark. It is important to note in this respect that the Ankara court came to that conclusion, not only because the applicant company had not used the trademark since April 1999, but also because the name “Vatan” was already well-known as a newspaper before the applicant company applied in November 1998 for registration of its name “Özlenen Gazete Vatan”.

9. To conclude, the majority find a violation of Article 1 of Protocol No. 1 on the grounds that there has been an interference with the applicant company’s trademark rights. However, since later developments at the domestic level have made clear that the applicant company could not claim any protection whatsoever from a trademark registration which was declared null and void, there is, in my opinion, no basis for holding that a property right existed.

The application should therefore have been declared incompatible *ratione materiae* with the provisions of the Convention and the Protocols thereto.