



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

SECOND SECTION

CASE OF TİMURLENK v. TURKEY

(Application no. 37758/08)

JUDGMENT

Art 1 P1 • Peaceful enjoyment of possessions • Depreciation of judgment
award vis-à-vis inflation due to insufficiency of statutory interest rates

STRASBOURG

28 January 2020

FINAL

22/06/2020

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

In the case of Timurlenk v. Turkey,

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

Robert Spano, *President*,

Valeriu Grițco,

Egidijus Kūris,

Ivana Jelić,

Arnfinn Bårdsen,

Darian Pavli,

Saadet Yüksel, *judges*,

and Stanley Naismith, *Section Registrar*,

Having regard to:

the application 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, Ms Ayşe Timurlenk (“the applicant”), on 25 July 2008;

the decision of 8 April 2014 to declare the applicant’s complaint regarding the length of proceedings inadmissible on account of a new remedy offered by Law no. 6384 and to adjourn the examination of the remainder of the application;

the decision of 3 October 2018 to give notice to the Turkish Government (“the Government”) of the remainder of the application concerning the depreciation in value of the judgment award on account of the allegedly insufficient default interest rate;

the parties’ observations;

Having deliberated in private on 7 January 2020,

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

INTRODUCTION

The case concerns, under Article 1 of Protocol No. 1 to the Convention, the alleged depreciation of a compensation amount *vis-à-vis* inflation.

THE FACTS

1. The applicant was born in 1948 and lives in Ankara. She was represented by Ms N. Özdemir, a lawyer practising in Ankara.

2. The Government were represented by their Agent.

3. The facts of the case, as submitted by the parties, may be summarised as follows.

4. On 25 July 1996 the applicant went to the gynaecological department of the GATA military hospital, complaining about a persistent ache in her uterus and excess bleeding.

5. After diagnosing the applicant's symptoms as uterine fibroids, the doctors decided to carry out a procedure called uterine fibroid embolisation. This procedure by way of an angiography is used for blocking the blood flow to the fibroids in order to reduce their size without surgery. It appears that this procedure was new in the hospital at the time and the applicant was the fourth patient selected for it. The doctors did not explain the procedure to her. The procedure was carried out immediately and the applicant was discharged the same day after being observed by the hospital staff for eight hours.

6. The next day the applicant went back to the hospital complaining about pain in her leg where the angiography had been carried out. She was examined by intern doctors in different departments of the hospital and was told that she could return home.

7. On 29 July 1996 the applicant went back to the hospital as her pain had not subsided. She was examined in the gynaecological department by an intern doctor who reported that he could not find anything in particular.

8. On 1 August 1996 the applicant was hospitalised in the GATA hospital's emergency department. After several surgeries, her leg was amputated on 8 August 1996. She was discharged from the hospital on 16 September 1996.

9. On 19 November 1996 the applicant brought compensation proceedings against the Ministry of Defence ("the Ministry") for medical negligence before the Ankara Assize Court in Civil Matters. On 27 January 1999 the civil court rejected the case on the ground of lack of jurisdiction, holding that the administrative courts were competent to examine the case.

10. On 26 May 1999 the applicant therefore lodged her compensation claim with the Ankara Administrative Court and requested a total of 45,000,000,000 Turkish liras (TRL) in respect of pecuniary damage, and TRL 5,000,000,000 in respect of non-pecuniary damage, with interest running from the date of the incident, that is 25 July 1996 (see paragraph 4 above).

11. On 17 March 2008 the Ankara Administrative Court found for the applicant and awarded the compensation requested by her in full in new Turkish liras (TRY),¹ that is TRY 50,000 for both pecuniary and non-pecuniary damage (equivalent to approximately 25,000 euros (EUR) at the time). The court also ruled that default statutory interest be applied to those amounts from the date of the incident.

12. The Ministry lodged an appeal against the judgment before the Supreme Administrative Court.

1. On 1 January 2005 the Turkish lira (TRY) entered into circulation, replacing the former Turkish lira (TRL). TRY 1 = TRL 1,000,000.

13. In the meantime, the applicant started enforcement proceedings against the Ministry for the judgment award. On 29 December 2008, the Ministry paid TRY 330,373 to the applicant.

14. On 10 April 2009 the Supreme Administrative Court upheld the Ankara Administrative Court's judgment of 17 March 2008 on the merits but quashed it in terms of the starting date of the statutory interest on the judgment award. It held that interest must run from the date when the applicant brought the compensation proceedings before the civil courts, namely on 19 November 1996 (see paragraph 9), and therefore remitted the case to the Ankara Administrative Court.

15. On 25 March 2010 the Ankara Administrative Court decided in line with the Supreme Administrative Court's reasoning and awarded the compensation to the applicant together with statutory interest running from 19 November 1996.

16. The applicant appealed against the judgment of 25 March 2010 on the grounds that the interest should run from the date of the incident that is from 25 July 1996. Her appeal was rejected as out of time.

17. On 10 June 2000 the Ministry requested the applicant to return TRY 28,620, the amount of overpayment as a result of the final ruling in respect of the date from which the interest started to run. On 11 November 2011 the applicant paid the amount back.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

18. The relevant domestic law and practice are set out in *Okçu v. Turkey* (no. 39515/03, §§ 19-31, 21 July 2009) with respect to compensation claims before the administrative courts.

19. The Compensation Commission was set up by Law no. 6384 in order to provide for the settlement, by means of compensation, of applications lodged with the Court concerning length of judicial proceedings and non-enforcement or delayed enforcement of judicial decisions. A full description of the relevant domestic law may be found in *Turgut and Others v. Turkey* ((dec.), no. 4860/09, §§ 19-26, 26 March 2013).

20. The Compensation Commission's competence was recently extended by the presidential decree no. 809 of 7 March 2019, published in the National Gazette on 8 March 2019. Accordingly, the Compensation Commission is now entitled to examine and grant compensation to applicants in cases where the Court has found a violation of Article 1 of Protocol No. 1 without rendering a decision on compensation or in cases where it has reserved the question under Article 41 of the Convention (see *Kaynar and Others v. Turkey*, nos. 21104/06 and 2 others, § 24, 7 May 2019).

THE LAW

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

21. The applicant complained that the compensation she had received for amputation of her leg due to medical negligence had fallen in value, since the default interest payable had not kept pace with the very high rate of inflation in Turkey. She relied on Article 1 of Protocol No. 1, 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. Submissions by the parties

22. The Government firstly submitted that the applicant had not exhausted domestic remedies, as required by Article 35 § 1 of the Convention, as she had not filed an appeal on time against the decision of the Ankara Administrative Court of 25 March 2010. They noted in that respect that the applicant had raised her grievances for the first time before the Court without giving an opportunity to the domestic authorities to rectify the impugned state of affairs.

23. The Government further submitted that the applicant had failed to lodge a separate action by using the remedy available to her under Article 105 of the Code of Obligations. Under that provision, she would have been eligible for compensation for the losses allegedly sustained as a result of the delays in payment of the compensation if she had established that the losses exceeded the amount of default interest.

24. On the merits, the Government considered that the applicant had not suffered any financial loss and that the State authorities had promptly paid the full amount awarded by the administrative court with statutory interest.

25. The applicant maintained her arguments in respect of the admissibility and merits of her application.

B. Admissibility

26. The Court refers, first of all, to the general principles concerning the exhaustion of domestic remedies as summarised in *Vučković and Others v. Serbia* ((preliminary objection) [GC], nos. 17153/11 and 29 others,

§§ 69-77, 25 March 2014). The Court reiterates, in particular, that Article 35 § 1 of the Convention only requires the exhaustion of remedies which are relevant to the impugned violations, available and adequate. A remedy is effective when it is available both in theory and in practice at the material time, that is to say is accessible and capable of providing the applicant with redress for his complaints and has reasonable prospects of success (see *Akdivar and Others v. Turkey*, 16 September 1996, § 68, *Reports of Judgments and Decisions* 1996-IV, and *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99, and 7 others, § 70, ECHR 2010).

27. In the present case, the Court notes that the applicant's complaint as it was formulated in her application form did not concern the start date of the interest rate on the judgment award. It concerned solely the insufficiency of the interest rate awarded to her at the end of the proceedings which had lasted almost fourteen years. It is therefore of no significance that the applicant failed to lodge a timely appeal about the issue concerning the start date of the interest, as this issue is not at the core of the subject-matter of the application.

28. The Court further refers to its findings made in the context of a complaint under Article 1 of Protocol No. 1 in conjunction with Article 13 of the Convention, that in the context of Turkish administrative law as in force at the material time there were no effective domestic remedies whereby claimants could claim damages for loss resulting from the difference between the rate of inflation and the statutory rate of interest over the lapse of a considerable period of time (see *Okçu v. Turkey*, no. 39515/03, §§ 27-32 and 64, 21 July 2009). Having regard to the fact that the administrative courts did not exercise discretion over the type of interest rate awarded in administrative proceedings, it is clear that an appeal against the judgment of 17 March 2008 would have had no prospects of success in respect of the applicant's Convention complaint. Therefore the applicant was not required to exhaust this remedy. As regards the Government's other objection concerning non-exhaustion of domestic remedies, namely an additional action for further damage under Article 105 of the Code of Obligations, the Court observes that it dismissed a similar objection in the cases of *Okçu* (cited above, § 67), *Gezer v. Turkey* (no. 18704/04, § 36, 6 October 2009), and more recently, *Zeki Kaya v. Turkey* (no. 22388/07, § 47, 12 February 2019). It sees no reason to do otherwise in the present case and therefore rejects the Government's objection.

29. 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.

C. Merits

30. The Court notes that it is not disputed between the parties that the domestic courts retroactively recognised the applicant's right to a "possession" by awarding compensation with statutory interest running from the date on which the debt arose (see *Zeytinli v. Turkey*, no. 42952/04, § 16, 26 January 2010). The compensation was paid to the applicant on 29 December 2008. The Court reiterates that it has found a violation of Article 1 of Protocol No. 1 in a number of applications in which the applicants complained about the insufficiency of the statutory interest rates *vis-à-vis* the high monetary inflation rates at a given period in Turkey (see *ibid.*, *Aka v. Turkey*, 23 September 1998, § 48, *Reports 1998-VI*, and *Okçu*, cited above, § 55). Having regard to the economic data for the period between the years 1996 and 2008, in particular the fact that the statutory interest rates applied between the years 1996 and 1999 was 30%, 50% and 60% respectively, whereas the actual inflation rate varied between 60% and 99%, the Court finds in the present case that the difference between the statutory interest rates applied to the compensation amount and the actual inflation rate must have caused the applicant to sustain financial loss. Consequently the applicant had to bear an individual burden that has upset the fair balance which must be maintained between the demands of the general interest and protection of the right to the peaceful enjoyment of possessions.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

31. 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."

32. The applicant claimed 300,000 euros (EUR) in respect of pecuniary damage and EUR 200,000 in respect of non-pecuniary damage. In respect of costs and expenses, she claimed EUR 125,000 without submitting any supporting documents.

33. The Government contested the amounts considering them to be excessive. They did not however provide a method of calculation for the adjustment of inflation concerning the pecuniary damage alleged by the applicant.

34. The Court notes that the Compensation Commission is now entitled to examine just satisfaction claims in applications where the Court has found a violation of Article of Protocol No. 1 to the Convention but has not

ruled on the applicants' claims for just satisfaction under Article 41 of the Convention or has decided to reserve the question (see paragraph 20 above). The Court further notes that in the recent case of *Kaynar and Others v. Turkey* (nos. 21104/06 and 2 others, 7 May 2019) where it found a violation of Article 1 of Protocol No. 1 on account of the legislative interference that deprived the applicants of the possibility to obtain the registration of their land, it decided to strike out the part of the application relating to Article 41 of the Convention on the basis that the Compensation Commission could decide the question in a better-informed manner (*ibid.*, §§ 76-78). In reaching that conclusion, the Court took into account the real difficulty it faced in calculating the pecuniary loss suffered by the applicants, since it was ill-equipped to determine from its seat in Strasbourg the amount corresponding to the value of the land in question at the time of the deprivation of the property, as well as the difficulty in assessing factors pertaining to the national context such as fluctuations in the value of the property over time. Moreover, the Court could not rely on the expert reports and the striking differences between the amounts proposed by those experts regarding the value of the land as those reports had not been obtained in an adversarial manner. Emphasising the subsidiary character of the Convention system of human rights protection and the importance of facilitating the performance of the respective tasks of the Court and the Committee of Ministers under Articles 41 and 46 of the Convention, the Court therefore concluded in that case that the Compensation Commission, as the national authority with expertise on compensation, having the appropriate legal and technical means, would be better equipped to calculate the question of compensation.

35. The Court further notes that it has taken the same approach in similar cases where the complexities flowing from the difficulty of calculating the pecuniary damage led it to strike out the question of just satisfaction by referring the question to the Compensation Commission (see, in particular, *Gümrükçüler and Others v. Turkey* (just satisfaction), no. 9580/03, § 37, 7 February 2017).

In sum, in all the above-mentioned cases, it is evident that the difficulty in calculating the actual pecuniary damage suffered by the applicants was decisive for the Court in its decision to strike out the part of the application under Article 41 of the Convention.

36. The Court reiterates its stance on welcoming the initiative taken by the Government in extending the Compensation Commission's competence to examining just satisfaction claims when the Court decides to strike out that part of the application (see *Kaynar and Others*, cited above, § 73). However, in the particular circumstances of the present case, the determination of the question of just satisfaction poses no real difficulty for the Court, as the depreciation in value of the money awarded to the applicant by the domestic courts can be calculated by an objective and

uncomplicated method which has been used by the Court in similar cases (see paragraph 38 below). Moreover, the Court emphasises that the present application was introduced in July 2008 and that the Court has found a violation of Article 1 of Protocol No. 1 to the Convention on account of a loss incurred by the applicant because of long term inflation not compensated by the statutory interest rate, effectively reducing the real value of the compensation awarded to her for an injury caused by medical negligence in the year 1996. There are thus particularly strong reasons in this case not to prolong the making of an award of just satisfaction under Article 41 of the Convention. Bearing in mind the above considerations, the Court therefore does not see any advantage in prolonging the determination of the question of just satisfaction in the case at hand, which conclusion in no way calls into question the effectiveness of the Compensation Commission. The Court will therefore continue to examine this part of the application.

37. The Court notes that on 17 March 2008 the Ankara Administrative Court awarded the applicant a total of TRY 50,000 in respect of pecuniary and non-pecuniary damage as a result of the incidence of medical negligence, plus statutory interest. According to the inflation calculation tool provided on the website of the Turkish Central Bank², that amount would have been worth approximately TRY 1,634,639 in December 2008 taking into account 19 November 1996 as the date of reference. That being so, the applicant only received a total of TRY 301,753 in December 2008 (that is the initial amount paid by the Ministry minus the amount the applicant had to give back as a result of the Supreme Administrative Court's ruling on the re-calculation of the start date of the interest, see paragraphs 13 and 17 above). The Court will therefore award compensation corresponding to inflation adjustment having regard to its approach in similar cases (see *Aka*, §§ 53-57, and *Zeki Kaya*, §§ 74-78, both cited above).

38. Having regard to the foregoing, the Court notes that TRY 1,332,886 corresponds to the financial loss sustained by the applicant as a result of the negative effects of inflation which were not offset by the statutory interest applied to the judgment award. The Court must also take into account the applicant's financial loss by adjusting the sum of TRY 1,332,886 to the latest data available to the Court at the date of the present judgment (inflation values of December 2019) by taking into account inflation up to the present (see *Zeki Kaya*, cited above, §§ 75-76). This calculation yields TRY 3,659,538 which corresponds to approximately EUR 571,802.

39. That being so, the Court reiterates that following the principle *ne ultra petitem* it does not award, as a rule, an amount exceeding that claimed

2. See <http://www.tcmb.gov.tr/>. This tool adjusts any sum of money for inflation on the basis of the Consumer Price Index and thus measures the buying power of the Turkish lira over time.

by the applicant (see, for example, *Gerasimov and Others v. Russia*, nos. 29920/05 and 10 others, § 191, 1 July 2014).

Having regard to the foregoing calculation and the principle of *ne ultra petitem*, the Court therefore awards the applicant EUR 300,000 in pecuniary damage.

40. Furthermore, having regard to all the circumstances of the present case, the Court considers that the applicant suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 1,250 in respect of non-pecuniary damage, plus any tax that may be chargeable.

41. As regards costs and expenses, according to the Court's case-law, an applicant is entitled to the reimbursement of such amounts only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Regard being had to the fact that the applicant failed to submit any documents in support of her claims regarding legal representation costs, the Court rejects them (see, among others, *Mihdi Perinçek v. Turkey*, no. 54915/09, § 88, 29 May 2018).

42. 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, 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*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 300,000 (three hundred thousand euros) , plus any tax that may be chargeable, in respect of pecuniary damage;
 - (ii) EUR 1,250 (one thousand two hundred and fifty euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (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;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 28 January 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Robert Spano
President