



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

FOURTH SECTION

CASE OF GABAY v. TURKEY

(Application no. 70829/01)

JUDGMENT
(Revision)

STRASBOURG

27 June 2006

FINAL

27/09/2006

*This judgment will become final in the circumstances set out in Article 44
§ 2 of the Convention. It may be subject to editorial revision.*

In the case of Gabay v. Turkey (request for revision of the judgment of 25 October 2005),

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

Mr J. CASADEVALL, *President*,

Mr G. BONELLO,

Mr R. TÜRMEŒ,

Mr M. PELLONPÄÄ,

Mr K. TRAJA,

Ms L. MIJOVIĆ,

Mr J. ŠIKUTA, *judges*,

and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 8 June 2006,

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

PROCEDURE

1. The case originated in an application (no. 70829/01) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Yusuf Gabay, on 16 November 2000.

2. In a judgment delivered on 25 October 2005, the Court held that there had been a violation of Article 6 § 1 of the Convention on account of the excessive length of domestic proceedings. The Court also decided to award the applicant 2,000 euros (EUR) for non-pecuniary damage and EUR 500 for costs and expenses and dismissed the remainder of the claims for just satisfaction.

3. On 17 March 2006 the Government informed the Court that they had learned that the applicant had died on 14 September 2003. They accordingly requested revision of the judgment within the meaning of Rule 80 of the Rules of Court.

4. On 28 March 2006 the Court considered the request for revision and decided to give the applicant’s representative three weeks in which to submit any observations. Those observations were received on 3 April 2006.

THE LAW

THE REQUEST FOR REVISION

5. The Government requested revision of the judgment of 25 October 2005, which they had been unable to execute because the applicant had died before the judgment had been adopted. They further maintained that the applicant's relatives had not wished to pursue the application before the Court.

6. The applicant's representative stated that she had not been informed by the applicant's relatives about his death, although the proceedings before the Court were known to them. She maintained that she had only found out this fact and that an application for the payment had been made by the relatives when she had applied to the Ministry of Foreign Affairs. She added that she had no further observations to make on the request for revision.

7. The Court notes that the applicant died on 14 September 2003, and that the applicant's relatives did not make a request to pursue the proceedings before the Court. It was not aware of the applicant's death, nor can this fact be assumed to have been known to the Government. In these circumstances, the Court considers that the judgment of 25 October 2005 should be revised pursuant to Rule 80 of the Rules of Court, the relevant parts of which provide:

"A party may, in the event of the discovery of a fact which might by its nature have a decisive influence and which, when a judgment was delivered, was unknown to the Court and could not reasonably have been known to that party, request the Court ... to revise that judgment.

..."

8. Having regard to the fact that the applicant died during the proceedings and that no relatives expressed the wish to pursue the proceedings, the Court considers that it is no longer justified to continue the examination of the application.

9. It accordingly decides that the case should be struck out of its list in accordance with Article 37 § 1 of the Convention.

FOR THESE REASONS, THE COURT

Declares unanimously the Government's request for the revision of the judgment of 25 October 2005 admissible;

Decides by six votes to one to revise the judgment as a whole and to strike the case out of the list.

Done in English, and notified in writing on 27 June 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Josep CASADEVALL
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Bonello is annexed to this judgment.

J.C.M
T.L.E.

DISSENTING OPINION OF JUDGE BONELLO

1. By the present judgment, the majority quashed the judgment delivered on 25 October 2005 in favour of the applicant, on discovering that the applicant had died before the case was decided and that no one had informed the Court of this fact.

2. This Court has repeatedly had to deal with exactly similar circumstances. Not once in its history did it react the way it did in the present case.

3. Precisely the same situation arose, to mention only some instances, in all the cases listed hereunder – the Court came to know, well after the judgment had been delivered, that the applicant had passed away in the course of the proceedings (see *Viola v. Italy* (revision), no. 44416/98, 7 November 2002, *Carolla v. Italy* (revision), no. 51127/99, 28 November 2002, *Frattini and Others v. Italy* (revision), no. 52924/99, 26 November 2002, *Ragas v. Italy* (revision), no. 44524/98, 17 December 2002, *D'Ammassa and Frezza v. Italy* (revision), no. 44513/98, 9 January 2003, *Armando Grasso v. Italy* (revision), no. 48411/99, 29 April 2003, *Guerrera and Fusco v. Italy* (revision), no. 40601/98, 31 July 2003, *Perhirin and 29 Others v. France* (revision), no. 44081/98, 8 April 2003, *Lutz v. France* (revision), no. 49531/99, 25 November 2003, *Santoni v. France* (revision), no. 49580/99, 1 June 2004).

4. In all these cases the Court was *not made aware* of the applicant's death at the time it delivered judgment. One of the parties – in *Frattini and Others*, *Perhirin and 29 Others* and *Santoni* it was the Government itself – that brought the applicant's death to the Court's notice after delivery of the judgment. The Court, thoroughly matter-of-factly, revised its decision, ordering the sum accorded as just satisfaction to be paid to the surviving family. No more, no less. None of these judgments considered dying during a court case as an abuse that cannot be left unpunished.

5. I am unable to see why the inveterate, and eminently reasonable, case-law of the Court was stood on its head in the present case. The applicant's family were denied what had been routinely allowed in every other similar case, whether the Court had been informed of the applicant's death by the applicant's family, or by the Government.

6. The consideration that a judgment given when the applicant has already passed away should have no existence or effect was, in my view rightly, disregarded in each and every one of the cases quoted above. In the case of *Karner v. Austria*, in which the applicant died prior to the judgment and his family expressly refused to pursue the application, the Court went one step further. The Government requested that the application should be struck off "since the applicant had died and there were no heirs who wished to pursue the application". The Court, well aware that the case no longer had any applicant at all, rejected the Government's plea and proceeded to

deliver judgment in the interest of human rights, ordering the respondent state to pay costs and expenses “to the applicant’s estate.”(no. 40016/98, ECHR 2003-IX). Yes, the interests of human rights were there considered of some relevance.

7. There is not one shred of evidence in the present case that the heirs of the deceased applicant have lost interest in the proceedings. On the contrary, the records show that after judgment was delivered, the relatives of the deceased had applied to the Government to receive the payment ordered by the Court. That hardly indicates that the applicant’s family had renounced the effects of the judgment or their claims under it.

8. I see no reason why the Court should have taken as graven in stone the Government’s wholly unsupported – and highly implausible – inference that the applicant’s family rejected monies due to the applicant and to them, without requiring the slightest verification from the heirs themselves. Why bother with *audi alteram partem* once you can settle for the Government’s *ipse dixit*?

9. I deem it an extremely fateful step that a court should make its own *res judicata* vanish. I deem it more serious still that so fateful a step was taken in the present case without the least effort having been made to inform the relatives of the deceased of the request for revision made by the Government. The Court knows full well that the lawyer of the deceased had denounced her brief. The applicant’s heirs (and the applicant’s lawyer too) have been deprived of their expectations, unaware of their fate and oblivious of the cordial goings-on between the Court and the Government behind their backs. If there is a rule somewhere by which those who stand to lose everything from the annulment of a judgment should be left in the dark until that *fait* is well and truly *accompli*, there must have been some flaw in my school curriculum.

10. I distance my name from all this.