



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

SECOND SECTION

CASE OF PEKİNEL v. TURKEY

(Application no. 9939/02)

JUDGMENT

STRASBOURG

18 March 2008

FINAL

18/06/2008

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 Pekinel v. Turkey,

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

Françoise Tulkens, *President*,

Antonella Mularoni,

Ireneu Cabral Barreto,

Vladimiro Zagrebelsky,

Danutė Jočienė,

Dragoljub Popović, *judges*,

Rauf Versan, *ad hoc judge*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 26 February 2008,

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

PROCEDURE

1. The case originated in an application (no. 9939/02) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Ms Süher Pekinel, Ms Güher Pekinel and Mr Mehmet Murat Pekinel (“the applicants”), on 5 October 2001. The first and second applicants are Turkish nationals and the third applicant is a stateless person of Turkish origin.

2. The applicants were represented by Mr Uğural, a lawyer practising in Strasbourg, and Mr Soybay and Mr Erkut, lawyers practising in Istanbul. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. On 28 June 2004 the Court decided to give notice of the application to the Government. Applying Article 29 § 3 of the Convention, it decided to rule on the admissibility and merits of the application at the same time.

4. On 20 November 2007 Mr Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr Rauf Versan to sit as an *ad hoc* judge, in his place (Article 27 § 2 of the Convention and Rule 29 § 1).

THE FACTS

THE CIRCUMSTANCES OF THE CASE

5. The first and second applicants were born in 1951 and the third applicant was born in 1948. They live in Turkey.

6. The applicants are the heirs of Mr Salih Ekrem Pekinel and Mr Abdurrahim Pekinel, who were their father and uncle respectively (“ancestors”). The applicants’ ancestors (*muris*) were allegedly the owners of 2,258,000 square metres of land, along with six other persons (“co-owners”), in the Maltepe village of the Menemen district in the Izmir province.

1. The Land Registry Commission’s land survey of 13 October 1961 and the objection of the Treasury

7. On 13 October 1961 the Land Registry Commission (*Tapulama Komisyonu*) attached to the General Directorate of Land Registration (*Tapu ve Kadastro Genel Müdürlüğü*) conducted a land registry survey (*tapulama tespiti*) and registered a plot of land (“plot no. 726”) in the Maltepe village as being owned by eight people - the applicants’ ancestors and the other co-owners.

8. In 1964 the Treasury challenged this land registry survey. It claimed that the land in question had been used as meadowland (*mera*) and that therefore it had not been correctly surveyed by the Commission.

9. On 22 May 1974 the land register was amended by the Land Registry Commission and the Treasury was registered as the owner of plot no. 726.

2. The Menemen Cadastre Court’s judgment of 7 July 1986

10. On 29 July 1974 six persons (“the plaintiffs”) filed an action with the Menemen Cadastre Court, requesting that the decision of the Land Registry Commission be set aside. They claimed that the land in question had been registered with their title and that it belonged neither to the Treasury nor to the applicants’ ancestors and the co-owners.

11. On an unspecified date the applicants’ ancestors filed a counter-claim that they held a share in plot no. 726. They requested that the former records at the land registry, which proved their right of ownership in respect of plot no. 726, be confirmed. They based their arguments on the land registry records of December 1884, which indicated that the land in question was owned by their father, Salih Paşa.

12. On 14 April 1979 Mr Abdurrahim Pekinel and, on 28 November 1982, Mr Salih Ekrem Pekinel died. The applicants were designated as their heirs.

13. On 7 July 1986 the Menemen Cadastre Court rendered its judgment. It held as follows:

“The land registry record of 1884 concerning plot no. 726 in Maltepe village was modified. ...

The same record was also modified regarding plot no. 1 in Seyrekköy village. The record concerning this plot became final since there was no objection. ...

According to the initial records, the size of the land was 1,103,163 square metres, whereas the size of plot no. 1 in Seyrekköy was found to be 3,619,600 square metres. It was established that the land’s borders were unclear in the records and thus open to enlargement. According to the case-law of the Court of Cassation and Article 42 of the Law on Cadastre, if the borders mentioned on records were uncertain and suitable for enlargement, the total amount indicated in these records should be taken into consideration.

...

Following the finalisation of the land registry record concerning plot no. 1 in Seyrekköy, both the plaintiffs and the plaintiffs in the counter-claim acquired land from this plot.”

14. The Menemen Cadastre Court further found that the land in question was public property because it had been used as meadowland. Thus it could not be the subject of a determination by the Land Registry Commission. The court concluded that plot no. 726 in the Maltepe village belonged neither to the plaintiffs nor to the applicants’ ancestors and the co-owners, but to the Treasury.

3. The Court of Cassation’s decision of 17 November 1988

15. On 17 November 1988 the Court of Cassation quashed the judgment of the Menemen Cadastre Court and remitted the case for reconsideration. The Court of Cassation observed that the Land Registry Commission had established that plot no. 726, which covered 2,258,000 square metres of land, had belonged to some of the plaintiffs. It noted that the Treasury had objected to the registration made by the Commission, claiming that the amount of land shown in the land registry exceeded the amount to which the plaintiffs were entitled. It pointed out that the plaintiffs had challenged the registration with reference to the records kept at the land registry and that the first-instance court had dismissed the case, qualifying the land as a “meadow”.

16. The Court of Cassation reasoned that the investigation carried out by the first-instance court was not sufficient to render a judgment. The plaintiffs based their claims on the records kept at the land registry. These records were included in the case file but did not indicate the land’s exact location. Furthermore, the documents concerning the neighbouring plots were not used and the nature of the property was not properly examined.

17. The Court of Cassation opined that, in order to reach a well-founded conclusion, the documents concerning the neighbouring plots should be included in the file, an on-site examination should be carried out, and local persons who were old and who knew the area should be heard. It considered in particular that issues concerning the nature and the ownership of the land and the identities of the persons who used the land should be determined by way of testimony. In addition, an expert report should be obtained from an agricultural engineer.

18. The Court of Cassation concluded that taking a decision without making a sufficient examination was incorrect, and that the reasoning as to the necessity of the determination by the Land Registry Commission was not accurate.

4. The Menemen Cadastre Court's judgment of 13 May 1992

19. Following the decision of the Court of Cassation, the case was remitted to the Menemen Cadastre Court.

20. The plaintiffs and the plaintiffs in the counter-claim, including the applicants, alleged that plot no. 726 had belonged to Salih Paşa and had been inherited by his heirs. Therefore, neither the Treasury nor other persons had a claim to it. In this connection, they stated that plot no. 1 in Seyrekköy and plot no. 726 in Maltepe had belonged to Salih Paşa and Hacı Velioğlu and that, following an agreement between their heirs, the land had been shared. They alleged that plot no. 1 in Seyrekköy had been given to the heirs of Hacı Velioğlu, whereas plot no. 726 had been reserved for the heirs of Salih Paşa. The applicants averred that they had not acquired any property from plot no. 1 in Seyrekköy.

21. The representative of the Treasury claimed that all the plaintiffs had received more land than that to which they were entitled after the Land Registry Commission's decision. He maintained that the plaintiffs had acquired property from plot no. 1 in Seyrekköy. He further claimed that the land in question was meadowland, which could not be qualified as private property.

22. The Menemen Cadastre Court carried out an on-site inspection and heard evidence from three local experts and an agricultural engineer.

23. On 13 May 1992 the Menemen Cadastre Court, taking into account the findings of the local experts and the reports of the agricultural engineer, decided that plot no. 726 in Maltepe belonged to the persons specified by the Land Registry Commission in 1961. It therefore ordered the registration of these persons or their heirs, including the applicants, as the owners of plot no. 726 in the Maltepe village at the land registry.

5. The Court of Cassation's decision of 21 April 1993

24. On 21 April 1993 the Court of Cassation quashed the judgment of 13 May 1992 and sent the case file to the Menemen Cadastre Court.

25. The Court of Cassation reasoned that the first-instance court had not conducted an adequate investigation, the guidelines of which had been indicated in its decision of 17 November 1988. It pointed out that the size of the land in question was 1000 *dönüm* according to the land registry records of 1884, whereas the land registry records of 1890 had indicated that the size of the land was 1200 *dönüm*. The court observed in this connection that the first-instance court had failed to explain the reason for the increase in the size of the land. Moreover, the first-instance court had failed to include in the case file the land registry record of 1875 for the land in question, the documents concerning the neighbouring plots of the land and the military maps of the area.

26. The Court of Cassation also noted that the land registry record of 1884 referred to some places as being the borders of the land in question, ("sıra melengeç, Yorgaki oğlu, İsmet hanım, harita, Kara istirahat, çataka tarlaları and kulak istifanı"), which was not fully comprehensible. Therefore, it should be determined whether the borders of the plot of land were correctly cited in the records at the land registry. The court stated that a map of the disputed plot of land and the neighbouring plots of land should be drawn up, and that the military map of the area, the statements of the experts and the local people should be taken into account when making that map.

6. The Menemen Cadastre Court's judgment of 11 November 1998

27. Upon receipt of the case file, the Menemen Cadastre Court re-examined the case.

28. It requested the General Directorate of Land Registration to submit a copy of the records of 1875 kept at the land registry office in respect of plot no. 726.

29. On 21 July 1994 the General Directorate informed the court that the record in question did not pertain to any plot of land in Seyrekköy.

30. On 1 December 1994 the Directorate sent the document in question and informed the Menemen Court that the reason for the increase in size of the property could not be determined.

31. In 1996 the plaintiffs of the initial case, which had been filed in 1974, withdrew their case, informing the court that they did not have a claim to plot no. 726.

32. The Menemen Cadastre Court carried out two further on-site inspections and took oral evidence from local experts and witnesses. During the on-site visit, a scientific expert and an agricultural expert also inspected the area and submitted their observations concerning the case.

33. In its judgment of 11 November 1998, the Menemen Cadastre Court stated the following:

“... The disputed property, plot no. 726 in Maltepe, was registered as a meadowland by the Land Registry Commission. The Commission determined the plaintiffs as the owners of the property having regard to the land registry records of 1921, 1946 and 1952. The Land Registry Commission’s decision indicated the size of the land in the amount of 2,258,000 square metres. Following the objection filed by the Treasury, on 22 May 1974, the record at the land registry was revised by the Land Registry Commission and the Treasury was registered as the owner of plot no. 726.

Plot no. 1 in Seyrekköy village was registered with the titles of some of the plaintiffs, who relied on the land registry records for their action.

It has been understood from the local experts’ statements that the words “*kulakistifan, yorgakioğlu, çanako, karaistifan*”, which were mentioned in the land registry records of 1952, 1890 and 1884, were the names of the Greeks who had left the country after the establishment of the Republic.

According to Article 20/C of Law no. 3402, if the borders indicated in the records and documents were not based on maps or sketches and were uncertain and suitable for enlargement, the amount indicated in these records and documents should be taken into consideration.

According to the case-law of the Court of Cassation the amount shall be taken into consideration if the records have unclear borders.

It has been understood that “*kulakistifan, yorgakioğlu, çanako, karaistifan*” are the names of Greeks whose whereabouts are unknown. Therefore, the land registry records should be valid as regards the amount of land indicated in them. However, some of the plaintiffs acquired more land than specified in the land registry records for plot no. 1 in the Seyrekköy village. Consequently, the case should be dismissed and, for the reasons explained above, the Treasury should be registered as the owner of plot no. 726 in the Maltepe village.”

7. The Court of Cassation’s decisions of 5 October 1999 and 26 February 2001

34. On an unspecified date the applicants appealed against the judgment of 11 November 1998.

35. After holding a hearing on the merits of the case, on 5 October 1999 the Court of Cassation dismissed the appeal, for the following reasons:

“It has not been proven that the amount of land cited in the land registry records of 1884 included the disputed plot. The record in question and the land registry records of 1926 had been revised in relation to plot no. 1 in Seyrekköy. It has been understood that the size of plot no. 1 in Seyrekköy is actually more than the size mentioned on the land registry records. It has also been understood that the borders indicated in the land registry records in respect of plot no. 1 in Seyrekköy are uncertain. It is clear that the extent of the land in plot no. 1 is greater than that indicated in both the land registry records. Accordingly, it should be acknowledged that the land registry records on

which the plaintiffs based their action relate to plot no. 1 in Seyrekköy. Therefore, the judgment should be upheld.”

36. On 26 February 2001 the Court of Cassation dismissed the applicants’ request for rectification of the decision, holding that the land registry records on which the plaintiffs had based their action in fact related to plot no. 1 in Seyrekköy.

37. The decision dated 26 February 2001 was not served on the applicants. It was deposited with the Registry of the Menemen Cadasre Court on 12 March 2001. The applicants stated that they only learned of it in July 2001.

THE LAW

I. THE GOVERNMENT’S PRELIMINARY OBJECTIONS

A. Non-observance of the six month rule

38. The Government contended that the applicants had failed to comply with the six month rule in respect of these complaints. They asserted that the applicants had not filed their application within six months of the deposit of the final decision with the registry of the Menemen Cadastre Court. Referring to the Court’s decision in the case of *Tahsin İpek v. Turkey* (application no. 39706/98, 7 November 2000), they claimed that the six month period had started to run from 12 March 2001, the date on which the Court of Cassation’s final decision was deposited with the registry of the Menemen Cadastre Court, and that the application had been introduced on 5 October 2001, which was more than six months later.

39. The Court notes that the Government relied on its decision in the *Tahsin İpek* case which concerned the failure of the applicant to procure the judgment of the Court of Cassation for more than six months after it had been deposited with the registry of the assize court. In this connection, it recalls that its findings in the *Tahsin İpek* case applied solely to the criminal proceedings since, according to the established practice of the Court of Cassation, the latter’s decisions in criminal cases are not served on the defendants. In civil law cases, however, the Court of Cassation’s decisions are served on the parties upon payment of the postage fee. Given that the proceedings in the instant case were of a civil nature, and in the absence of any contention that the applicants had failed to pay the relevant fees, the domestic authorities were under an obligation to notify the applicants of the final decision. As the applicants learned of the decision in July 2001 and

lodged their application within six months of that date, they must be considered to have complied with the six month rule laid down in Article 35 § 1 of the Convention.

40. Accordingly, the Government's objection must be dismissed.

B. Non-exhaustion of domestic remedies

41. The Government argued that the applicants have not exhausted domestic remedies, as they failed to raise their complaint before the national courts.

42. The Court reiterates that the obligation to exhaust domestic remedies only requires that an applicant make normal use of effective and sufficient remedies; that is, those capable of remedying the situation at issue and affording redress for the breaches alleged.

43. It observes that the Turkish legal system does not provide any remedies to accelerate the proceedings. Nor does it award any compensation for delay. The Court accordingly concludes that there was no appropriate and effective remedy which the applicants should have exercised for the purposes of Article 35 § 1 of the Convention (see *Mete v. Turkey*, no. 39327/02, §§ 18-19, 25 October 2005). It therefore rejects this aspect of the Government's preliminary objections.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

A. As to the length of the proceedings

44. The applicants complained that the length of the proceedings had been incompatible with the "reasonable time" requirement, laid down in Article 6 § 1 of the Convention, which reads as follows:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by [a] ... tribunal..."

45. The Government contested that claim.

46. The Court notes that the proceedings in question began on 29 July 1974 and ended on 26 February 2001. They thus lasted twenty six years and seven months for two levels of jurisdiction dealing with the case several times. The Court's jurisdiction *ratione temporis*, however, only permits it to consider the period of fourteen years and one month which has elapsed after 28 January 1987, the date of deposit of Turkey's declaration recognising the right of individual petition to the European Commission of Human Rights. It must nevertheless take account of the state of the proceedings at that time (see *Şahiner v. Turkey*, no. 29279/95, § 21,

ECHR 2001-IX). It notes that by that date, the case had already been pending 12 and a half years.

1. Admissibility

47. The Court notes that this complaint 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.

2. Merits

48. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicants and the relevant authorities and what was at stake for the applicants in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

49. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present application (see *Frydlender*, cited above).

50. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion here. Having regard to its case-law on the subject, the Court finds that in the instant case the length of the proceedings was excessive and failed to meet the “reasonable time” requirement.

There has accordingly been a breach of Article 6 § 1.

B. As to the fairness of the proceedings

51. The applicants further contended under Article 6 § 1 of the Convention that the decisions of the domestic courts had been arbitrary. In their view, the domestic courts failed in the evaluation of evidence and disregarded the evidence which proved their property rights.

52. The Government maintained that the requirements of a fair hearing were fulfilled in every aspect. They stated that the domestic courts’ decisions were based on documentary evidence, witness statements, on-site inspections and expert reports.

53. The Court notes that, in the present case, the applicants mainly complained about the assessment of evidence and the result of the proceedings before the domestic courts. It recalls that it is not its task to act as an appeal court of “fourth instance” by calling into question the outcome of the domestic proceedings. The domestic courts are best placed for assessing the relevance of evidence to the issues in the case and for

interpreting and applying rules of substantive and procedural law (see, amongst many authorities, *Vidal v. Belgium*, judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, § 32).

54. The Court observes that, during the domestic proceedings, the applicants had the benefit of adversarial proceedings. They were legally represented throughout the proceedings and were able to argue their claim to the ownership of the land and call witnesses in support of their case. The Court of Cassation also held a hearing on the merits of the case and heard from both parties. Moreover, the factual and legal reasons for dismissing the case were set out at length both in the judgment of the first-instance court and the decisions of the Court of Cassation. In these circumstances, it cannot be contended that the domestic court had overlooked important aspects of the case or had failed to have regard to the historical background to the dispute.

55. As a result, the relevant domestic decisions do not disclose any manifestly arbitrary reasoning and the Court sees no appearance of a violation of Article 6 § 1 as regards the outcome of the proceedings.

56. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

57. Invoking Article 1 of Protocol No. 1 to the Convention, the applicants alleged that the domestic court decisions constituted an unjustified interference with their right to property. In this connection, they claimed that the land registry records dated 1884, 1947 and 1952 proved their ownership of plot no. 726 in the Maltepe Village. Underlining the fact that they had not obtained a share in plot no. 1 in the Seyrekköy Village, the applicants complained that, because of the arbitrary decisions of the national courts, they had been deprived of their land which had belonged to their ancestors for a long time.

58. The Government maintained that the applicants' complaint had been thoroughly examined by the domestic courts and it had been established that they had no property right to plot no. 726. The Government noted that the land registry records, on which the applicants had based their allegations, had already been taken into consideration when determining the borders of plot no. 1 in Seyrekköy.

59. The Court notes that the applicants' complaint under Article 1 of Protocol No. 1 to the Convention is closely linked to that made under Article 6 § 1 of the Convention. It further recalls that it is not for the Court to settle the issue of ownership of disputed land (see *Nalbant v. Turkey* (dec.), no. 61914/00, 12 May 2005).

60. In the present case, the domestic proceedings indeed concerned the determination of ownership of land and, after a lengthy examination, the domestic courts found that the applicants had no property right to plot no. 726. Having regard to its conclusion above concerning the fairness of the proceedings, the Court finds no indication that the applicants have been arbitrarily or unlawfully deprived of their property in breach of Article 1 of Protocol No. 1. In the Court's view, the applicants cannot claim to have a "possession" within the meaning of the first sentence of Article 1 of Protocol No. 1 and the guarantees of that provision do not therefore apply to the present case (see *Sarıaslan and Others v. Turkey* (dec.), no. 32554/96, 23 March 1999; *Şişikoğlu v. Turkey* (dec.), no. 38521/02, 20 October 2005).

61. In view of the above, the Court concludes that this complaint should be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

62. 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

63. The applicants claimed 20,000,000 American dollars (USD) (approximately 14,500,000 euros (EUR)) in respect of pecuniary damage and USD 100,000 (approximately EUR 72,500) in respect of non-pecuniary damage.

64. The Government contested these claims.

65. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, the Court accepts that the applicants must have suffered some non-pecuniary damage on account of the duration of the proceedings, which cannot be sufficiently compensated by the finding of a violation alone. Having regard to its case-law and making its assessment on an equitable basis, the Court awards EUR 10,000 to each of the applicants under this head.

B. Costs and expenses

66. The applicants also claimed USD 25,150 (approximately EUR 18,000) for the costs and expenses incurred before the Court.

67. The Government contested the claim.

68. According to the Court's case-law, an applicant is entitled to reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the applicants have not substantiated that they have actually incurred the costs claimed. Accordingly, it makes no award under this head.

C. Default interest

69. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the excessive length of the proceedings admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay each of the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage, to be converted into New Turkish liras at the rate applicable at the date of settlement, free of any taxes or charges which may be payable;
 - (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* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 18 March 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President