



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

SECOND SECTION

CASE OF ABACI v. TURKEY

(Application no. 33431/02)

JUDGMENT

STRASBOURG

7 October 2008

FINAL

07/01/2009

This judgment may be subject to editorial revision.

In the case of Abacı v. Turkey,

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

Françoise Tulkens, *President*,

Antonella Mularoni,

Vladimiro Zagrebelsky,

Danutė Jočienė,

Dragoljub Popović,

András Sajó,

Işıl Karakaş, *judges*,

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 16 September 2008,

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

PROCEDURE

1. The case originated in an application (no. 33431/02) 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 a Turkish national, Mrs Kerime Abacı (“the applicant”), on 1 May 2002.

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

3. On 5 November 2007 the Court decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1938 and lives in Hatay.

5. On 15 September 1993 the applicant bought a plot of land (plot no. 1241), near the coast in Hatay. The land was registered in the applicant’s name in the Land Registry. She built a house there.

6. On 4 July 1995 the Treasury brought an action before the Samandağ Court of First Instance, requesting the annulment of the applicant’s title deed to the land on the ground that it was located within the coastal area.

7. On 16 December 1999 the Samandağ Court of First Instance upheld the Treasury's request and decided to annul the title deed of the applicant to the plot of land. In its decision, the court held that, pursuant to domestic law, coastal areas could not be subject to private ownership and that, therefore, the applicant could not rely on the argument that she had acted *bona fides*.

8. On 16 May 2001 the Court of Cassation upheld the judgment of the first-instance court. On 14 January 2002 a request by the applicant for rectification was rejected by the Court of Cassation.

II. RELEVANT DOMESTIC LAW AND PRACTICE

9. The relevant domestic law and practice in force at the material time are outlined in the *Doğrusöz and Aslan v. Turkey* judgment (no. 1262/02, § 16, 30 May 2006).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

10. The applicant complained that the authorities had deprived her of her property without payment of compensation, in violation of Article 1 of Protocol No. 1, which, in so far as relevant, 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...”

A. Admissibility

11. The Government submitted that the applicant had not exhausted domestic remedies, as required by Article 35 § 1 of the Convention, as she had failed to make proper use of the civil law remedies available to her in domestic law. In this respect they presented a recent rectification decision of the Court of Cassation (dated 9 July 2007) which had quashed a first-instance court judgment on the ground that compensation to the owner of the title deed to land situated within the coastal area had not been awarded although the title-deed had been annulled. In two other decisions presented by the Government (dated 23 October 2007 and 1 November 2007) the Court of Cassation upheld first-instance court judgments which annulled the title deeds but, with reference, *inter alia*, to the Court's judgments on the

right to property, held that the owners of the title deed had the right to claim compensation before civil courts.

12. The applicant contested the Government's arguments.

13. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants first to use the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness (see *Burden and Burden v. the United Kingdom*, no. 13378/05, § 35, ECHR 2006-...). In addition, it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *Nyanzi v. the United Kingdom*, no. 21878/06, § 42, 8 April 2008).

14. The Court reiterates that it has already examined and found the domestic remedies referred by the Government in previous similar cases to be ineffective (see, for example, *Doğrusöz and Aslan*, cited above, § 22, and *Asfuroğlu and Others v. Turkey*, nos. 36166/02, 36249/02, 36263/02, 36272/02, 36277/02, 36319/02, 36339/02 and 38616/02, § 15, 27 March 2007).

15. As regards the Government's submissions on the availability of domestic remedies, the Court welcomes the recent interpretation of the Court of Cassation in cases concerning the annulment of title deeds to land located within the coastal area (see paragraph 11 above). However, it observes that there appears to be, so far, no example of compensation being awarded in such cases. The one example in which the Court of Cassation quashed the judgment in this respect (*idem*) seems to be pending before domestic courts. The Court further reiterates that in the instant case the applicant's appeal and the following claim for rectification were dismissed by the Court of Cassation on 16 May 2001 and 14 January 2002 respectively.

16. Consequently, the Court holds that the applicant, in the instant case, cannot be expected to initiate new proceedings claiming compensation for a title deed that had been annulled by a court order, the final decision having been delivered some six years ago.

17. In the light of the foregoing, the Court concludes that the Government's preliminary objection of non-exhaustion must be dismissed. This ruling is confined to the circumstances of the present case and is not to be interpreted as a general statement that the recent approach of the domestic courts is ineffective or that applicants are absolved from the

obligation under Article 34 to have recourse to the system of remedies which are available and functioning.

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

B. Merits

19. The Government maintained that, according to the Constitution, the coastal area belongs to the State and cannot become private property. They argued that the applicant should have been aware that the use of property in a shore area owned by the State could not lead to ownership. Therefore, the entry of the applicant's name in the Land Registry was contrary to the Constitution and the laws applying at the material time, and the illegal transaction was corrected by the Samandağ Court of First Instance.

20. The applicant maintained her allegations.

21. The Court has examined similar cases on previous occasions and has found violations of Article 1 of Protocol No. 1 in respect of the annulment of title deeds acquired in good faith but later restored to State ownership without compensation being paid (see *Doğrusöz and Aslan*, cited above, §§ 26-32, and *Aslan and Özsoy v. Turkey*, nos. 35973/02 and 5317/02, § 21, 30 January 2007). The Court finds no reason to depart from that conclusion in the present case.

Accordingly, it finds that there has been a violation of Article 1 of Protocol No. 1.

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

22. The applicant also complained under Article 6 § 1 of the Convention that the domestic court decision was unfair, biased, insufficiently motivated and against the provisions of both domestic and international law.

23. The Government contested these arguments.

24. An examination by the Court of the material submitted to it does not disclose any appearance of a violation of this provision. It follows that this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

25. 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

26. The applicant claimed 150,000 euros (EUR) in respect of pecuniary damage. She based her claim for pecuniary damages on an expert report dated 2 October 2001, prepared at the first-instance court’s request. According to this report the value of the land in dispute was 64,114,470,000 Turkish liras (TRL)¹. She further claimed 15,000 US dollars in respect of non-pecuniary damage.

27. The Government contested these claims, arguing that they were unsubstantiated, speculative and excessive.

28. The Court reiterates that when the basis of the violation found is the lack of any compensation, rather than the inherent illegality of the taking, the compensation need not necessarily reflect the full value of the property (*I.R.S and Others v. Turkey* (just satisfaction), no. 26338/95, §§ 23-24, 31 May 2005). It therefore deems it appropriate to fix a lump sum that would correspond to the applicant’s legitimate expectations to obtain compensation.

29. In view of the above, the Court awards the applicant EUR 40,000 for pecuniary damage.

30. As regards the applicants’ claim for non-pecuniary damages, the Court finds that, in the circumstances of the present cases, the finding of a violation constitutes sufficient just satisfaction (see *Doğrusöz and Aslan*, cited above, § 38, and *Adil Özdemir v. Turkey*, no. 36531/02, § 42, 10 May 2007).

B. Costs and expenses

31. The applicant also claimed TRL 832,130,000 [approximately EUR 426] in respect of the costs and expenses incurred before the domestic courts and 519.20 New Turkish Liras (YTL) [approximately EUR 267] for those incurred before the Court. In this respect she referred to a number of receipts issued by her representative and the domestic courts. She added that some of the expenses could not be documented.

32. The Government contested the claims.

1. The equivalent of EUR 44,575 on 2 October 2001.

33. On the basis of the material in its possession and ruling on an equitable basis, the Court awards the applicant the total sum claimed, EUR 693, in respect of costs and expenses.

C. Default interest

34. 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 under Article 1 of Protocol No. 1 admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 1 of Protocol No. 1;
3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into Turkish liras at the rate applicable at the date of settlement:
 - (i) EUR 40,000 (forty thousand euros), plus any tax that may be chargeable, in respect of pecuniary damage;
 - (ii) EUR 693 (six hundred and ninety-three euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (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;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 7 October 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President