



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

SECOND SECTION

CASE OF TANAY v. TURKEY

(Application no. 18753/04)

JUDGMENT

STRASBOURG

9 December 2008

FINAL

09/03/2009

This judgment may be subject to editorial revision.

In the case of Tanay v. Turkey,

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

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Vladimiro Zagrebelsky,

Danutė Jočienė,

András Sajó,

Nona Tsotsoria,

Işıl Karakaş, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 18 November 2008,

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

PROCEDURE

1. The case originated in an application (no. 18753/04) 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 Mehmet Tanay (“the applicant”), on 11 February 2004.

2. The applicant was represented by Mrs Fatma Kalsen Demirdaş, a lawyer practising in Tunceli. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicant alleged, in particular, that a factual error made by the Court of Cassation had infringed his right of access to court, in violation of Article 6 of the Convention.

4. On 20 November 2007 the Court decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1956 and lives in Istanbul.

6. On 18 November 1997 the General Directorate of National Roads and Highways (hereinafter “the Directorate”) expropriated 4,309 square metres of the applicant’s land in Tunceli. The expropriation decision was

communicated to the applicant on 16 August 2000. According to the domestic procedure, the applicant had thirty days, which began the day after the decision was communicated to him, to ask for an increase in the amount of compensation.

7. On 1 September 2000 a certain Mr Sezai Yıldız, who had been authorised by the applicant to appoint a lawyer for him, had a power of attorney drawn up at a notary public, appointing Mrs Fatma Kalsen Demirdaş as legal counsel to represent the applicant.

8. On 19 September 2000 the applicant, with the assistance of his lawyer Mrs Demirdaş, brought an action before the Tunceli Civil Court (hereinafter the “Tunceli Court”), seeking increased compensation. Mrs Demirdaş requested the court to accept the case despite the expiry of the statutory time-limit on 17 September 2000, as she had had health problems preventing her lodging the case earlier.

9. On 9 November 2000 the Tunceli Court asked the Forensic Medicine Institute in Ankara to clarify whether Mrs Demirdaş had had health problems at the relevant time and whether those problems had been of a nature to render it impossible for her to come to the court house and lodge the applicant’s case within the statutory time-limit.

10. On 22 May 2001 the Erzurum branch of the Forensic Medicine Institute forwarded to the Tunceli Court a number of medical reports, confirming that Mrs Demirdaş had been ill between 23 August 2000 and 17 September 2000 and had thus been unable to lodge the case within the statutory time-limit.

11. The Tunceli Court accepted the medical report and began examining the merits of the case. In the course of the proceedings it had regard to the zone plan, the expropriation documentation, two principal and two additional expert reports, and awarded the applicant additional compensation on 31 May 2001. The Directorate appealed.

12. On 3 March 2003 the Court of Cassation quashed the decision, quoting the applicant’s name, instead of that of his representative, as the person who had been ill. The Court of Cassation stated that the applicant had given a power of attorney to Fatma Kalsen Demirdaş so that, even if he had been ill, Mrs Kalsen Demirdaş could have lodged the claim on his behalf within the statutory time-limit. The Court of Cassation consequently held that the case had been time-barred on 17 September 2000.

13. In an application for rectification Mrs Demirdaş argued that it was she who had been ill, not her client. The Court of Cassation had therefore made a factual error which should be rectified.

14. On 12 May 2003, the Court of Cassation held that “amending the factual error would not affect the outcome”, and dismissed the rectification request.

15. On 4 July 2003 the Tunceli Court concurred with the Court of Cassation's decision and dismissed the case. On 13 November 2003 the Court of Cassation upheld the final ruling.

II. RELEVANT DOMESTIC LAW AND PRACTICE

16. According to sections 166-168 of the Code of Civil Procedure, if a person or his or her legal representative is unable to comply with a statutory time-limit for reasons outside his or her control, that individual is given an additional ten-day period starting on the date when the situation giving rise to the inability to comply has ended.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

17. The applicant complained that the Court of Cassation's mistake had violated his right to a fair hearing within the meaning of Article 6 of the Convention, which reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

18. The Government contested that argument.

A. Admissibility

19. 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.

B. Merits

20. The Government accepted that the Court of Cassation had made an error by referring in its decision to the applicant as the person who had been ill. The Government also acknowledged that, according to the applicable legislation and the case-law of the Court of Cassation, if a party in domestic proceedings fell ill and became unable to comply with a statutory time-limit, he or she would be given an additional ten-day period starting on the date of recovery from the illness.

21. However, the Government were of the opinion that the applicant's legal representative's illness had not justified her failure to comply with the time-limit. Holding otherwise would mean that, whenever a party missed a time-limit, he or she would obtain a medical report from a medical institute and request extra time.

22. The Government alleged that the applicant's legal representative had pretended to have been ill only when she realised that she had missed the time-limit. It was also remarkable, according to the Government, that on 1 September 2000 Sezai Yıldız had given a power of attorney to Mrs Demirdaş to represent the applicant, yet, according to the medical report, Mrs Demirdaş had been ill on that day.

23. Furthermore, although it had been open to Mrs Demirdaş to delegate one of her colleagues to file the case on her behalf, she had failed to do so and had acted in an irresponsible manner, causing a disadvantage to the applicant.

24. Lastly, the Government reminded the Court that it was not a court of first instance; it was not for the Court to evaluate the evidence and decide as if it were a first-instance court.

25. The applicant maintained his complaints. He submitted that there existed official medical records showing that his legal representative had been treated at the hospital. Thus, the distrust displayed by the Government towards his legal representative, as well as towards the official medical institutions, had been unjustified.

26. As regards the Government's submission that his legal representative had accepted the power of attorney at a time when she was purportedly ill, the applicant referred to the applicable legislation which stipulated that a lawyer did not have to be present when a power of attorney was signed at a notary public by his or her client. Furthermore, the applicant maintained that he did not know at the time of giving the power of attorney that his representative was ill.

27. Lastly, the applicant argued that the main issue in the case had been the factual error made by the Court of Cassation and that that factual error had infringed his right of access to court.

28. The Government conceded that the Court of Cassation had made a factual error. Furthermore, the Government have not disputed that the applicant was penalised by the Court of Cassation on account of the error for which he was not responsible (see, *mutatis mutandis*, *Platakou v. Greece*, no. 38460/97, § 39, ECHR 2001-I). What the Government did challenge is the veracity of the applicant's claim that his legal representative had been ill.

29. The Court notes that the veracity of this claim and the accuracy of the medical reports issued by the Forensic Medicine Institute – a State body – were never the subject of the domestic courts' examination as there had never been any suggestion of impropriety in the domestic proceedings.

Indeed, the Government's accusations about the health of the applicant's legal representative are not supported by any evidence and, as such, the Court cannot attach any importance to them.

30. Similarly, the Court deems it unnecessary to examine the Government's arguments concerning whether or not the legal representative had been right in accepting the power of attorney when she was ill and whether or not she should have delegated another lawyer to file the applicant's case on her behalf. These are issues for the domestic courts to examine; as pointed out by the Government, the Court is not a court of first instance. Nevertheless, it is important to note that these matters were not raised and examined by the domestic courts and that the Court of Cassation's conclusion that the applicant had failed to comply with the time-limit was not based on these issues.

31. The Court of Cassation's decision was based solely on the erroneous mention of the applicant's name, instead of that of his legal representative, as the person who had been ill. It accordingly quashed the decision in which the applicant had been awarded additional compensation for the expropriation of his land. When this error was brought to its attention in rectification proceedings, the Court of Cassation concluded that amending their error would not affect the outcome of the case.

32. The Court reiterates that it is not the Court's function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX). Furthermore, it is in the first place for the national authorities, and notably the courts, to interpret domestic law and the Court will not substitute its own interpretation for theirs in the absence of arbitrariness (see *Tejedor García v. Spain*, 16 December 1997, § 31, *Reports of Judgments and Decisions* 1997-VIII and the cases cited therein).

33. In the present case it is necessary to examine the consequences of the factual error made by the Court of Cassation since it had a bearing on the determination of the applicant's civil rights under Article 6 of the Convention. The Court considers that the justification put forward by the Court of Cassation when refusing to correct the error (see paragraph 14 above) lacked any relevant reasoning. In the opinion of the Court, contrary to what was suggested by the Court of Cassation, correcting the factual error would have made a critical difference to the assessment of the applicant's compliance with the domestic rules of procedure. The Court thus concludes that the Court of Cassation's unreasoned decision based on the factual error violated the applicant's rights under Article 6 § 1 of the Convention.

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

34. The applicant further complained that the Court of Cassation's refusal to correct its error had also violated his rights under Article 1 of Protocol No. 1 to the Convention.

35. The Government contested that argument.

36. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

37. The Court further notes that the main Convention question raised in the present application is the applicant's rights guaranteed by Article 6 § 1 of the Convention. Having found a violation of that provision (paragraph 33 above), the Court considers that there is no need to make a separate ruling on this remaining complaint. In reaching this decision the Court has particular regard to the fact that the Court of Cassation did not examine the merits of the appeal lodged by the Directorate.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. 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

39. The applicant claimed 21,877 euros (EUR) in respect of pecuniary and EUR 10,000 in respect of non-pecuniary damage.

40. The Government contested the claims and argued that the sums were excessive and not supported by evidence.

41. As regards pecuniary damage, the Court reiterates that the most appropriate form of redress for the violation of Article 6 § 1 would be to ensure that the applicant, as far as possible, is put in the position in which he would have been had this provision not been disregarded (see *Mehmet and Suna Yiğit v. Turkey*, no. 52658/99, § 47, 17 July 2007). Consequently, it considers that the most appropriate form of redress would be to restart the appeal proceedings, correcting the factual error, should the applicant so request (see, *mutatis mutandis*, *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003).

42. As regards non-pecuniary damage, deciding on an equitable basis, the Court awards the applicant EUR 3,000.

B. Costs and expenses

43. The applicant also claimed EUR 677 for the costs and expenses incurred before the domestic courts and EUR 1,423 for those incurred before the Court. The claim made in respect of costs and expenses incurred before the domestic courts and the claim made in respect of the costs and expenses incurred before the Court included the sums of EUR 389 and EUR 1,142 respectively, in respect of his lawyer's fees. In support of the claims for these fees the applicant submitted a copy of the agreement signed by both himself and his lawyer. The remaining EUR 569, for which the applicant submitted receipts, was claimed in respect of domestic court fees and translation expenses.

44. The Government contested the claims.

45. 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 were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,800 covering costs under all heads. The Court considers that the remaining EUR 300 had been claimed in respect of court fees and other costs incurred before the Tunceli Court prior to the Court of Cassation's factual error. As such, it was not incurred for the prevention or redress of the violation (see *Société Colas Est and Others v. France*, no. 37971/97, § 56, ECHR 2002-III).

C. Default interest

46. 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 application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* that there is no need to examine the complaint under Article 1 of Protocol No. 1 to the Convention;

4. *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 sums, plus any tax that may be chargeable to the applicant, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 3,000 (three thousand euros) in respect of non-pecuniary damage, and

(ii) EUR 1,800 (one thousand eight hundred euros) 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 9 December 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President