



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

SECOND SECTION

CASE OF ERBEY v. TURKEY

(Application no. 29188/02)

JUDGMENT
(on the merits)

STRASBOURG

10 March 2009

FINAL

14/09/2009

This judgment may be subject to editorial revision.

In the case of Erbey 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,

Dragoljub Popović,

Nona Tsotsoria,

Işıl Karakaş, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 2 December 2008,

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

PROCEDURE

1. The case originated in an application (no. 29188/02) 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, Mr Cemil Erbey (“the applicant”), on 23 May 2002.

2. The applicant was represented by Mr E. Şahin, a lawyer practising in İzmir. The Turkish Government (“the Government”) were represented by their Agent.

3. On 12 June 2007 the President of the Second Section 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).

4. By a letter dated 28 November 2008 the applicant's representative informed the Court that the applicant had died on 21 August 2008 and that his heirs, Ms Hatice Erbey, Mr Mehmet Erbey and Ms Emine Sönmez (Erbey), wished to pursue his application. The Government had no comments on this request.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1926 and lived in İzmir.

6. On 23 February 1998 the applicant bought a plot of land (plot no. 536 in the Ulucak village, in the Menemen district of İzmir) from the heirs of V.G.

7. On 13 July 1999 the Ministry of Agriculture (“the Ministry”) brought an action before the Menemen Civil Court, requesting the annulment of the title deed of the applicant to plot no. 536 and its registration in the Treasury's name, claiming that it had had actual possession of this land since 1966. The Ministry primarily relied on Article 38 of the Expropriation Act (Law no. 2942). The Ministry also alleged that an expropriation had been effected in relation to the said land in 1966 and that V.G. had received compensation for it. However, the land register had not been amended due to an administrative error.

8. On 20 December 2000 the Menemen Civil Court accepted the request of the Ministry of Agriculture and ordered that the land be registered in favour of the Treasury in accordance with Article 38 of Law no. 2942. In its judgment, the first-instance court noted that the Ministry had been in actual possession of this land for more than twenty years and that the applicant had been aware of this fact when he had bought the plot.

9. The applicant appealed.

10. On 17 September 2001 the Court of Cassation upheld the judgment of 20 December 2000.

11. The applicant requested rectification of the decision of 17 September 2001.

12. On 24 December 2001 the Court of Cassation dismissed the applicant's request.

13. On 4 January 2002 the Court of Cassation's decision was served on the applicant.

14. On 10 April 2003 the Constitutional Court annulled Article 38 of Law no. 2942.

II. RELEVANT DOMESTIC LAW

15. A full description of the domestic law may be found in *Börekçiogulları (Çökmez) and Others v. Turkey* (no. 58650/00, §§ 23-29, 19 October 2006).

THE LAW

I. LOCUS STANDI

16. The Court notes that the applicant died on 21 August 2008 and that his heirs, namely Ms Hatice Erbey, Mr Mehmet Erbey and Ms Emine Sönmez (Erbey), expressed their wish to pursue the application. The Government did not contest the applicant's heirs' standing before the Court. Consequently, the Court holds that these heirs have standing to continue the present proceedings in the applicant's stead. However, Mr Cemil Erbey will continue to be referred to as the applicant.

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

17. The applicant complained that the deprivation of his land without compensation amounted to a violation of Article 1 of Protocol No. 1.

18. The Government contested that argument.

A. Admissibility

19. The Court notes that the application 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 maintained that the impugned plot had been expropriated in 1966 and compensation had been paid to V.G., the owner of the land at the material time. In view of this expropriation, which had been effected long before its purchase by the applicant, the Government argued that the applicant had never had a legitimate property right to the land in question. To support their allegations, the Government submitted a document dated 13 September 1966, which notified V.G. through the notary public of the expropriation decision and further informed him that the relevant compensation would be deposited at a public bank.

21. The applicant contested these submissions. He argued that the expropriation of the plot had never been completed as alleged by the Government as the expropriation compensation had never been deposited with the bank and hence the title deed register had never been amended in favour of the Treasury.

22. The Court observes in the first place that despite its allegations concerning the expropriation of the disputed plot, the Government cannot produce any evidence to prove that any payment was made in relation to this expropriation to finalise it. In these circumstances, and bearing in mind the ownership status at the title deed register prior to the judgment of the Menemen Civil Court on 20 December 2000, the Court believes that there is not enough evidence to conclude that the impugned land was effectively expropriated by the Ministry at any point.

23. Secondly, the Court observes that regardless of whether any expropriation was effected in 1966 or not, the Menemen Civil Court relied on no reasons other than section 38 of Law no. 2942 in ordering the registration of the land in favour of the Treasury. In these circumstances, the Court cannot but conclude that the applicant was the legal owner of the disputed land up until the judgment of the Menemen Civil Court and that he was deprived of his land within the meaning of Article 1 of Protocol No. 1, pursuant only to section 38 of Law no. 2942.

24. In this connection, the Court notes that according to section 38 of Law no. 2942, applications for compensation for deprivation of property had to be made within twenty years of the date the property was occupied. By applying this provision retrospectively, the national courts deprived the applicant of any possibility of obtaining compensation for the annulment of his title deed. The Court observes at this point that, since the application was lodged with the Court, section 38 of Law no. 2942 has been annulled by the Constitutional Court as being unconstitutional. In its judgment dated 10 April 2003, the Constitutional Court held that limiting an individual's right to property, by maintaining that the right to bring an action against the *de facto* occupation of the disputed property lapses, and requiring that the property must be transferred to the authorities twenty years after that occupation, was contrary to the Constitution. Moreover, referring to the case-law of the Court, it held that depriving individuals arbitrarily of their right to property and their right to compensation was contrary to the principle of the rule of law.

25. The Court takes into consideration the judgment of the Constitutional Court and acknowledges its reasoning. Nevertheless, it notes that the judgment of the Constitutional Court did not have retroactive effect and therefore did not provide the applicant with a procedure capable of redressing the effects of a possible violation of the Convention. Consequently, it considers that the matter has not been resolved within the meaning of Article 37 § 1 (b) of the Convention (see *Börekçioğulları (Çökmez) and Others*, cited above, § 41).

26. The Court considers that the application of Article 38 of Law no. 2942 to the applicant's case had the consequence of depriving him of the possibility to obtain damages for the annulment of his title. Although such an interference was founded on legislation that was valid at the

material time, it could only be described as arbitrary, in so far as no compensation procedure capable of maintaining the fair balance which had to be struck between the demands of the general interest of the community and the requirement of the protection of the individual's fundamental rights had been put in place (see *Akilli v. Turkey*, no. 71868/01, § 33, 11 April 2006).

27. Accordingly, the Court concludes that there has been a violation of Article 1 of Protocol No. 1.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

28. 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

29. The applicant claimed 6,500,000 euros (EUR) in respect of pecuniary damage. He did not submit any documents in support of his claim.

30. The Government contested this claim.

31. In the circumstances of the case, the Court considers that the question of the application of Article 41 is not ready for decision and must be reserved, due regard being had to the possibility of an agreement between the respondent State and the applicant's heirs.

B. Costs and expenses

32. The applicant did not claim any costs and expenses. Accordingly, no award is made under this head.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that the applicant's heirs, namely Ms Hatice Erbey, Mr Mehmet Erbey and Ms Emine Sönmez (Erbey), have standing to continue the present proceedings in the applicant's stead;
2. *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
4. *Holds* that the question of the application of Article 41 of the Convention is not ready for decision; accordingly,
 - (a) *reserves* the said question;
 - (b) *invites* the Government and the applicant's heirs to submit, within six months from the date of notification of the judgment, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
 - (c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 10 March 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President