



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

1959 · 50 · 2009

SECOND SECTION

CASE OF EFENDİOĞLU v. TURKEY

(Application no. 3869/04)

JUDGMENT

STRASBOURG

27 October 2009

FINAL

27/01/2010

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 Efendioğlu v. Turkey,

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

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Danutė Jočienė,

András Sajó,

Nona Tsotsoria,

Işıl Karakaş,

Kristina Pardalos, *judges*,

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

Having deliberated in private on 6 October 2009,

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

PROCEDURE

1. The case originated in an application (no. 3869/04) 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 Şükrü Efendioğlu (“the applicant”), on 7 October 2003.

2. The applicant was represented by Mr I. Kahraman, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. On 6 March 2008 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 2 July 2009 the applicant's representative informed the Court that the applicant had died and that his heirs, Ms Emine Efendioğlu, Mr Ali Rıza Efendioğlu, Mr Abdul Hadi Efendioğlu, Mr Veysel Efendioğlu, Mr Muzaffer Efendioğlu and Ms Feyza Efendioğlu 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 1930 and had been living in Erzurum. On 11 June 2009 he died.

6. On 6 April 1989 the applicant bought a plot of land (no. 5784) in Istanbul. The land was later divided in five parts (plot nos. 13320, 13321, 13322, 13323 and 13324).

7. Upon the Ümraniye Municipality's decision to put a notice in the Land Registry in 1993, the applicant learned that there was a water pipeline passing underneath plot no. 13324.

A. The proceedings for annulment of the applicant's title deed to plot no. 13324

8. On 12 April 2000 the Istanbul General Directorate for Water and Infrastructure (the "ISKI") filed an action with the Üsküdar Civil Court of First Instance and requested the annulment of the title deed of the applicant to the land in question and its registration in their name. In this respect, they submitted that they had occupied the disputed plot of land since 1970 by way of laying down a water pipeline underneath it and that, therefore, it should be registered under its name pursuant to Article 38 of Law no. 2942.

9. In the course of the proceedings a commission of experts examined the documentary evidence and conducted an onsite inspection together with the court. On 17 July 2001 the experts submitted their report where they considered, *inter alia*, that the land in question would be worth around 305,972,500,000 Turkish liras¹. In the annexed document it was noted that plot no. 13324 was *de facto* a road.

10. On 28 December 2001 the Üsküdar Civil Court of First Instance, noting that as of 15 November 2001 the Ümraniye Civil Court of First Instance had become operational, transferred the case to it.

11. On 18 June 2002 the Ümraniye Civil Court of First Instance, on the basis of the evidence, particularly official documents concerning the construction of the water pipeline, accepted the request of the ISKI and ordered that the land be registered in their name. It considered, in particular, that the applicant's property rights over the land in question had ceased, following the expiry of the statutory time-limit provided under Article 38 of the Law no. 2942.

12. The applicant appealed. Referring to a court case concerning the previous owner of the plot of land, the applicant submitted, *inter alia*, that the water pipeline in question passed through another plot and not plot no. 13324, and that the statutory time-limit provided under Article 38 of the Law no. 2942 had not expired since a notice was put in the Land Registry only in 1993.

1. Approximately 265,163 Euros (EUR) at the time.

13. On 10 December 2002 the Court of Cassation upheld the first-instance court's judgment. The applicant's request for rectification was rejected on 17 March 2003. This decision was served on him on 8 April 2003.

B. Subsequent developments

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

15. On an unspecified date the applicant asked the Ümraniye Civil Court of First Instance to reopen the proceedings on the ground, *inter alia*, that, according to their own investigation there were no water pipelines passing underneath plot no. 13324 and, consequently, the court's earlier decision had been based on erroneous official documents and the false testimony of State officials.

16. On 11 December 2003 the Ümraniye Civil Court of First Instance dismissed the applicant's request on the ground that the applicant had already made similar claims in the earlier proceedings, that in the presence of official documents there was no need, in such cases, to investigate by digging up the disputed land, and that, although Article 38 of Law no. 2942 had been subsequently annulled by the Constitutional Court, this was not a reason for reopening the proceedings.

17. The applicant's appeal and subsequent request for a rectification was dismissed by the Court of Cassation on 17 May 2004 and 28 September 2004 respectively.

18. In 2004 the Ümraniye Magistrates' Court, upon the applicant's request, conducted an onsite inspection of the land. The appointed experts considered that the water pipelines in question were not laid underneath the applicant's plot but next to it.

19. In 2008 the Ümraniye Magistrates' Court, upon the ISKI's request, conducted another inspection of the land. The appointed experts considered that the water pipelines in question passed next to plot no. 13324, not underneath it.

II. RELEVANT DOMESTIC LAW AND PRACTICE

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

THE LAW

I. LOCUS STANDI

21. The Court notes that the applicant died on 11 June 2009 and that his heirs, namely Ms Emine Efendioğlu, Mr Ali Rıza Efendioğlu, Mr Abdul Hadi Efendioğlu, Mr Veysel Efendioğlu, Mr Muzaffer Efendioğlu and Ms Feyza Efendioğlu, 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 Şükrü Efendioğlu will continue to be referred to as the applicant.

II. ADMISSIBILITY

22. The Government asked the Court to dismiss the application for failure to comply with the requirement of exhaustion of domestic remedies under Article 35 § 1 of the Convention. In this connection, they maintained that the applicant had failed to raise the substance of his complaints before the domestic courts and to ask for compensation for either *de facto* expropriation of his land or for its unlawful occupation. The Government further claimed that the applicant could have also brought a civil nuisance and abatement action or an action for tort.

23. The applicant did not specifically respond to the above arguments.

24. The Court reiterates that it has already examined and rejected similar arguments by the Government in previous cases (see, for example, *I.R.S. and Others v. Turkey*, no. 26338/95, §§ 35-36, 20 July 2004, and *Börekçiogulları (Çökmez) v. Turkey* (dec.), no. 58650/00, 13 January 2005). The Court finds no particular circumstances in the present application which would require it to depart from that conclusion. Consequently, the Court rejects the Government's preliminary objection.

25. Moreover, the Court finds that the applicant's 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.

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

26. The applicant complained that he had been unjustifiably deprived of his land without payment of compensation in breach of Article 1 of Protocol No. 1, which reads, in so far as relevant, 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. The parties' submissions

27. The Government maintained that the annulment of the applicant's title deed and the registration of the land in the name of the ISKI complied with domestic law and that Article 1 of Protocol No. 1 did not stipulate a right to full compensation under all circumstances.

28. The applicant submitted that there was no public interest in depriving him from his property rights without payment of compensation. In this connection, he pointed out that Article 38 of the Law no. 2942 was subsequently annulled by the Constitutional Court. Moreover, the applicant noted that he had been deprived of his land without payment of compensation because of insufficient investigation since it was clear that no pipeline passed through his land.

B. The Court's assessment

29. The Court refers to the basic principles laid down in its judgments concerning Article 1 of Protocol No. 1 (see, in particular, *Börekçiogulları (Çökmez) and Others*, §§ 35-37, cited above, and the cases referred to therein). It will examine the present case in the light of these principles.

30. In the instant case there is no dispute that the land in question had been registered in the name of the applicant. The title deed was transferred to the ISKI by the Ümraniye Civil Court of First Instance's decision, which was upheld by the Court of Cassation on 10 December 2002. Therefore the decision of the domestic courts clearly had the effect of depriving the applicant of his property within the meaning of the second sentence of Article 1 of Protocol No. 1. The Court must therefore examine whether this interference was justified under that provision.

31. The Court finds that the Ümraniye Civil Court of First Instance's decision to register the land in the name of the ISKI was provided for by law, as it was based on Article 38 of the Law no. 2942, which came into force on 4 November 1983. In this connection, the Court takes note that the applicant, by reference to expert reports drawn up in 2004 and 2008, criticises the manner in which the domestic courts reached their decision that the ISKI was in possession of the land in question within the meaning of Article 38 of the Law no. 2942. In the present circumstances, however, the Court is not required to take a position on this matter since, in any event, the key issue to be examined is that of proportionality, i.e. whether a fair

balance was struck between the means employed and the aim sought to be realised.

32. In the instant case, the Court recalls that the applicant's title deed to the land in question was transferred to the General Directorate for Water and Infrastructure pursuant to Article 38 of the Law No. 2942, which provides that applications for compensation for the deprivation of property had to be made within 20 years from 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. In this connection, the Court notes that it 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 restored to State ownership by applying Article 38 of the Law no. 2942 without compensation being paid (see, for example, *İnci (Nasıroğlu) v. Turkey*, no. 69911/01, §§ 24-27, 14 June 2007, *Börekçioğulları (Çökmez) and Others*, §§ 40-43, and *I.R.S. and Others*, §§ 50-56, both cited above). The Court finds no reason to depart from that conclusion in the present case.

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

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

34. In the application form the applicant further complained under Article 6 of the Convention and under unspecified provisions of Protocol No.7 about the manner in which the first-instance court determined the merits of the case. In particular, he considered that the first-instance court had failed to properly investigate whether the Water Authorities' pipeline passed underneath his plot of land.

35. The Court considers that the applicant's complaints fall to be examined under Article 6 of the Convention alone. Moreover, having regard to the facts of the case, the submissions of the parties and its finding of a violation under Article 1 of Protocol No. 1 above, the Court considers that it has examined the main legal question raised in the present application. It concludes therefore that there is no need to give a separate ruling on the applicant's remaining complaint under Article 6 (see, for example, *Günaydin Turizm Ve İnşaat Ticaret Anonim Şirketi v. Turkey*, no. 71831/01, § 109, 2 June 2009, *K.Ö. v. Turkey*, no. 71795/01, § 50, 11 December 2007, *Mehmet and Suna Yiğit v. Turkey*, no. 52658/99, § 43, 17 July 2007, and *Uzun v. Turkey*, no. 37410/97, § 64, 10 May 2007).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. 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

37. The applicant claimed 899,222 euros (EUR), plus interest running from the date of lodging of the application, in respect of pecuniary damage, and EUR 100,000 in respect of non-pecuniary damage. He based his claim for pecuniary damages on an expert report¹ prepared by Ms Sevim Ünal, a construction engineer, on 24 June 2008 at the applicant's request for the purposes of the present proceedings and submitted to the Ümraniye Civil Court of First Instance.

38. The Government contested the amounts. In particular, they held that the value of the land was based on fictitious calculations and assumptions.

39. As regards the applicant's claim for pecuniary damage, in the absence of documents provided by the Government to support the contrary, the Court, having regard the documents contained in the case file, including expert reports, photographs and maps contained in the case file (see paragraphs 9 and 37 above), the circumstances of the case and, in particular, to the fact that the land in question had been and is currently used as a public road, deems it appropriate to fix a lump sum that would correspond to the applicant's legitimate expectations. It accordingly awards the applicant's heirs, jointly, EUR 350,000 under this head.

40. As to the applicant's claim for non-pecuniary damages, the Court finds that, in the circumstances of the present case, the finding of a violation constitutes sufficient just satisfaction.

B. Costs and expenses

41. The applicant also claimed EUR 560 for the costs and expenses incurred both before the domestic courts and the Court. He submitted documentation in this respect.

42. The Government contested the amount.

1. The expert report contains pictures which clearly indicate that the plot in question is used as a road.

43. 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 full amount claimed by the applicant.

C. Default interest

44. 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 1 of Protocol No. 1;
3. *Holds* that there is no need to examine separately the complaint under Article 6 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant's heirs, jointly, 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 350,000 (three hundred and fifty thousand euros) in respect of pecuniary damage, plus any tax that may be chargeable;
 - (ii) EUR 560 (five hundred and sixty euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant's heirs;
 - (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 27 October 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President