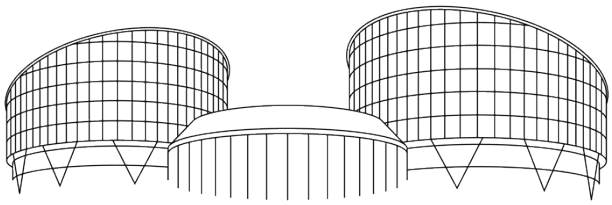

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 787/03
by Cemile BOZOĞLU (AKARSU) and Others
against Turkey

The European Court of Human Rights (Third Section), sitting on 30 March 2010 as a Chamber composed of:

Josep Casadevall, *President,*
Corneliu Bîrsan,
Boštjan M. Zupančič,
Alvina Gyulumyan,
Egbert Myjer,
Luis López Guerra,
Işıl Karakaş, *judges,*

and Stanley Naismith, *Deputy Section Registrar*,

Having regard to the above application lodged on 7 September 2002,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Mrs Cemile Bozoğlu (Akarsu), Mrs Hepgül Korucu (Akarsu), Mr Hamit Akarsu, Mr Mahmut Akarsu, Mr Aziz Akarsu, Mr Veysel Akarsu, Mr Alem Akarsu and Mrs Leyla Demir (Akarsu), are Turkish nationals who were born in 1950, 1942, 1953, 1948, 1946, 1937, 1933 and 1934 respectively and live in Erzurum. They were represented

before the Court by Mr A.F. Ataman and Mrs H. Ataman, lawyers practising in Erzurum. The Turkish Government ("the Government") were represented by their Agent.

A. The circumstances of the case

2. The facts of the case, as submitted by the parties, may be summarised as follows.

3. The applicants are the owners of a plot of land of 40,000 square metres (plot no. 227) in Nenehatun village, Erzurum. The plot in question is situated in the vicinity of military barracks.

4. On an unspecified date, the military forces enclosed 23,600 square metres of plot no. 227 with a wire fence.

5. On 18 May 1998 the applicants brought an action (case no. 1998/184) in the Third Chamber of the Erzurum Civil Court of First Instance against the Ministry of National Defence ("the Ministry") and requested compensation for *de facto* expropriation of 23,600 square metres of their plot. They alleged that the Ministry had forbidden them access to their land, claiming that it was a military security zone.

6. On 11 June 1998 the Treasury and the Ministry brought a cross-action (case no. 1998/234) with the First Chamber of the Erzurum Civil Court of First Instance and requested to be registered as the owners of plot no. 227, claiming that the plot in question was located in a restricted military and security zone and that the military forces had control over it pursuant to Articles 7, 9 and 21 of Law no. 2565 (Law on the Restricted Military Zones and Security Zones).

7. On an unspecified date the Third Chamber of the Erzurum Civil Court of First Instance decided to await the outcome of the proceedings before the First Chamber.

8. On 28 October 1998 a judge from the First Chamber of the Erzurum Civil Court of First Instance, together with representatives of the parties and experts, conducted a survey of the applicants' land. The local experts stated that the land had been owned by Musa Akarsu and that the applicants had inherited it from him. They noted that the military brigade had occupied half the land and had fenced it in 1990-1991, during the first Gulf War. The applicants had been denied access to half their land by the military authorities but had continued to cultivate the other half for almost eight years. The wire fence had been removed some five or six months before.

9. On 17 December 1998 the First Chamber of the Erzurum Civil Court of First Instance dismissed the case by the Treasury and the Ministry. In its judgment the first-instance court stated the following:

"...

It has been understood that plot no. 227 comprises 40,000 square metres and that the owner of the plot was Musa Akarsu, the ancestor of the defendants. He used the plot until his death in 1998 and since then the defendants have been using it. It has also been understood that the military command enclosed 10,300 square metres of the plot during the eighties and that the fence was removed in the summer of 1998.

The witnesses stated that the plot had been used by the ancestor of the defendants prior to the Gulf War and that during the Gulf War the military command had moved the fence and had taken actual possession of half the plot.

In a letter dated 10 November 1998 the Erzurum Construction and Property Directorate of the Ministry informed the court that the plot was outside the military zone.

In view of the evidence gathered, the court concludes that the disputed plot is outside the military zone and that the defendants are in actual possession of it. The administration has failed to substantiate its allegation and therefore the case is dismissed.

..."

10. On 14 June 1999 the Court of Cassation upheld the judgment of 17 December 1998.

11. In a letter of 22 December 1999 the Commander of the 9th Army Corps informed the Third Chamber of the Erzurum Civil Court of First Instance that the land in question, namely 23,600 square metres of land forming part of plot no. 227, was within the military security zone. However, under Law no. 2565 and Law no. 5949, owners of land within military security zones were free to reside and carry out agricultural activities. According to this letter, owners of such land are required to seek permission from the authorities only for construction, timber felling or sale of their property to non-Turkish citizens.

12. On 30 December 1999 the Third Chamber of the Erzurum Civil Court of First Instance awarded the plaintiffs[1] in case no. 1998/184 a total of 6,354,117,600 Turkish liras (TRL)[2] for the value of the land, in accordance with the expert report submitted to it. The first-instance court ordered the annulment of the applicants' title and registration of the land with the title of the defendant. It observed that the plaintiffs' ancestor had been the owner of plot. 227 and that the Ministry had limited their rights over the plot, which had resulted in the *de facto* expropriation of the land. The court further considered that the control of the use of property by the administration contradicted the legal principles governing the right to property.

13. On an unspecified date, the Treasury and the Ministry appealed.

1. It is to be noted that the first name of Mahmut Akarsu was mentioned as "Mehmet" in the judgment of 30 December 1999 and the Court of Cassation's decision of 5 June 2000.
2. Approximately 11,670 euros (EUR) at the relevant time.

14. On 5 June 2000 the Court of Cassation quashed the judgment of 30 December 1999. In its decision, the Court of Cassation stated the following:

> "...
>
> 1- There is no power of attorney attesting that Refika Akarsu and Mahmut Akarsu had given authority to the plaintiffs' representative. Therefore, the first-instance court should have rendered a decision pursuant to Article 67 of the Code on Civil Procedure in respect of these two plaintiffs.
>
> 2- According to the letter of the 9th Army Corps Command dated 22 December 1999, the land in dispute is located within the military security zone. As mentioned in this letter, there is no control of the use of the property as rural land (*arazi*). The owner of the land can use it subject to the authorisation of the Army Corps Command. Since the plot in question is rural land [as opposed to urban land (*arsa*)], there is no *de facto* expropriation and, therefore, the plaintiffs cannot request compensation.
>
> ..."

15. On an unspecified date the applicants requested rectification of the Court of Cassation's decision.

16. On 6 October 2000 the Court of Cassation dismissed their request.

17. On 30 March 2001 the first-instance court abided by the Court of Cassation's decision and decided to discontinue the proceedings in so far as they had been brought by Refika Akarsu and Mahmut Akarsu pursuant to Article 67 of the Code on Civil Procedure. It further dismissed the applicants' claim for the value of the land in accordance with the Court of Cassation's reasoning.

18. On 30 October 2001 the Court of Cassation upheld the judgment of 30 March 2001.

19. On 8 March 2002 the Court of Cassation once again dismissed the applicants' request for rectification of the decision.

20. On 4 December 2007 the authorities carried out an inspection of the applicants' land (plot no. 227). The inspection report, prepared by a real estate expert, stated that the premises had been visited in the company of the village mayor and that it had been observed that the plot in question had stayed outside the fence. Furthermore, the land was not occupied and there was no obstacle to cultivation. Yet it had been noted that, according to some witnesses, the land was only used to grow grass (for animals) and not cultivated.

21. The relevant page of the log book kept at the Erzurum land registry office indicates that Musa Akarsu, the applicants' ancestor, had been the owner of the land in dispute.

B. Relevant domestic law and practice

22. A description of the relevant domestic law and practice can be found in *Tiryakioğlu v. Turkey* (dec.), no. 24404/02, 13 May 2008.

23. It appears from the established practice of the Court of Cassation that when land is located within a restricted military zone the owners of the land in question cannot claim compensation for *de facto* expropriation unless the administration permanently denies access to that land with the intention of owning it (see, in particular, decision no. 2002/376 on file no. 2002/4-382 of the Grand Chamber of the Court of Cassation). Furthermore, such restriction is not considered *de facto* expropriation. Accordingly, the litigants cannot claim compensation for the value of their land. However, they may obtain compensation for temporary denial of access to land or damage resulting from restrictions imposed on the use of their land.

24. Article 125 of the Turkish Constitution provides as follows:

> "All acts or decisions of the administration are subject to judicial review.
>
> ...
>
> The administration shall be liable to indemnify any damage caused by its own acts and measures."

COMPLAINTS

25. The applicants complained under Article 1 Protocol No. 1 to the Convention that the control of the use of 23,600 square metres of plot no. 227 had constituted *de facto* expropriation and that the authorities had failed to compensate them for the damage resulting from the *de facto* taking of their property.

THE LAW

26. The applicants complained that the *de facto* expropriation of their land and the national authorities' failure to compensate their damage had constituted a breach of Article 1 of Protocol No. 1 to the Convention, which 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.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Admissibility

1. The parties' submissions

27. The Government submitted that the application had not been lodged within the six-month time-limit and that, alternatively, the applicants had failed to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention. In this connection, the Government noted that the last domestic decision in the present case had been given by the Court of Cassation on 8 March 2002, whereas the application had been submitted to the Court on 16 September 2002, more than six months after the final decision. They maintained also that by failing to seek permission from the 9th Army Corps Command of the Land Forces to use their land, the applicants could not be considered to have exhausted all remedies available to them in domestic law.

28. The applicants claimed that they had lodged their application within the required six-month time-limit, contrary to the Government's allegations. They further contended that they had already made an oral request to the military authorities to be able to use their land; however that request had been rejected and therefore they had brought proceedings for compensation in the civil courts. Moreover, since soldiers on duty had killed two of their cattle which had gone into the fenced area, they were scared to make a new request to the military authorities. Thus, the applicants claimed that they had exhausted all remedies available to them.

2. The Court's assessment

29. As to the first aspect of the Government's objections, the Court notes that the applicants' letter in which they had set out a summary of the facts and complaints giving rise to their application had been received by fax at the Registry of the Court on 7 September 2002. Accordingly, this date should be accepted as the date of introduction of the application (see Rule 38 § 2 of the Rules of Court).

30. As regards the date on which the six-month period had started running, it is an established practice in Turkey that in civil law cases the Court of Cassation's decisions are served on the parties when payment of the postage fee has been made in advance (see *Islamic Republic of Iran Shipping Lines v. Turkey*, no. 40998/98, § 83, ECHR 2007-...). Although the proceedings in the instant case are of a civil nature, the parties did not inform the Court whether the Court of Cassation's decision dated 8 March 2002 had been served on the applicants. Nevertheless, even assuming that

the applicants had been informed of this last decision on the same day, and indeed the applicants did not argue to the contrary, the six-month period commenced on 8 March 2002. It thus follows that the present application has been introduced within the six-month period, in compliance with Article 35 § 1 of the Convention. Accordingly, the Government's objection concerning the alleged failure to observe the six-month rule must be dismissed.

31. Turning to the second aspect of the Government's objections, the Court notes that the Government argued that following the removal of the wire fence the applicants could have used their land had they made an attempt to do so and sought permission from the Commander of the 9th Army Corps.

32. In the Court's opinion, however, the applicants were not in the circumstances of those who were required to seek permission from the military authorities in order to carry out agricultural activities. As the Commander of the 9th Army Corps noted in his letter dated 22 December 1999, permission is only required for those who wished to construct a building or to carry out timber felling in their land or to sell their property to non-Turkish citizens (see paragraph 11 above).

33. Be that as it may, the Court notes that, according to the inspection report dated 4 December 2007, there is no obstacle preventing the applicants from cultivating their land (see paragraph 20 above). Indeed, the applicants did not challenge the findings contained in this report. Although the applicants claimed that their oral request to use their land had been rejected and that they were afraid to make a further request to the military authorities subsequent to the killing of their cattle by the soldiers (see paragraph 28 above), they did not provide any details in this respect, such as the date and nature of their request, the authority who refused their request, when and how their cattle were killed. In these circumstances and in the absence of sufficient evidence, the Court considers that the applicants have failed to substantiate their allegations that they had been denied access to their land since the removal of the wire fence in 1998.

34. Nevertheless, it is undisputed and even accepted by the domestic authorities that the applicants could not cultivate half their land from 1990-1991 until the summer of 1998 because of the wire fence put in place by the military authorities (see paragraphs 8 and 9 above). In this connection, the Court notes that the applicants claimed that the military authorities' denial of access to a portion of their land had amounted to a *de facto* expropriation, whereas the national courts, in particular the Court of Cassation, concluded that the restriction in question could not be regarded as *de facto* expropriation because the applicants were still the owners of the land in question and that they could use their land subject to the authorisation of the military authorities (see paragraph 14 above).

35. The Court reiterates that it is primarily a supervisory body and subsidiary to the national systems safeguarding human rights. The domestic courts are better placed to evaluate the facts or interpret the domestic law unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *García Ruiz v. Spain* [GC], no. 30544/96, §§ 28-29, ECHR 1999-I).

36. That being so, the Court sees no reason to depart from the Court of Cassation's finding that the interference at issue cannot be regarded as a *de facto* expropriation. Despite the clarity of the domestic practice and established case-law on the matter (see paragraph 23 above), the applicants brought an action for *de facto* expropriation, whose conditions of admissibility were not met in the instant case.

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

For these reasons, the Court unanimously

Declares the application inadmissible.

Stanley Naismith
Deputy Registrar

Josep Casadevall
President