CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

CASE OF BÖREKÇİOĞULLARI (ÇÖKMEZ) AND OTHERS v. TURKEY

(Application no. 58650/00)

JUDGMENT

STRASBOURG

19 October 2006

FINAL

26/03/2007

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 Börekçioğulları (Çökmez) and Others v. Turkey,

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

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr R. TÜRMEN,
Mr C. BÎRSAN,
Mrs A. GYULUMYAN,
Mr E. MYJER,
Mr DAVID THÓR BJÖRGVINSSON, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 28 September 2006,

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

PROCEDURE

1. The case originated in an application (no. 58650/00) 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 six Turkish nationals, Ms Suna Börekçioğulları (Çökmez), Ms Nazmiye Hançerli, Mr Ahmet Göksenin Hançerli, Ms Ayşe Göknil Hançerli, Mr Şeref Hakan Hançerli and Ms Serpil Tetik (Hançerli) ("the applicants"), on 25 January 2000.

2. The applicants were represented by Mr E. Türk and Mrs S. Gökbender, lawyers practising in Ankara. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

3. The applicants complained under Article 1 of Protocol No. 1 of the Convention that they were deprived of their land without being paid compensation for their loss.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

6. By a decision of 13 January 2005 the Court declared the application admissible.

7. The applicants and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicants were born in 1935, 1957, 1980, 1983, 1967 and 1958 respectively, and live in Ankara.

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

10. The applicants are the heirs of Mustafa Çökmez, who owned a 321,76 m² plot of land in Ankara. In 1942 the Ministry of Defence took actual possession of this plot of land and established a military base. According to the applicants, it was not until the land consolidation proceedings that the administration took control of their property. The applicants continued to pay the land tax every year, until the decision of 23 December 1998 by which their title to the land in question was transferred to the State and they lost their title to the land in question.

11. In 1981 and 1989 the domestic authorities conducted land consolidation proceedings and revised the local plans. When Mustafa Çökmez died in 1990, the applicants inherited this plot of land and it was registered in their name.

12. On 18 April 1990, upon the request of the Ministry, it was noted in the title registry that the administration considered expropriating the land in question. On 24 April 1990 the applicants were informed of the annotation. On 21 August 1990 a group of experts valued the land. Later on the administration renounced its decision to expropriate.

13. On 22 March 1991 the applicants brought an action for compensation against the Ministry of Defence before the Ankara Civil Court of General Jurisdiction. They submitted, *inter alia*, that the Ministry of Defence was in actual possession of the land illegally since they had not conducted expropriation proceedings or compensated them for the damage resulting from the interference. The Ministry of Defence denied the allegations and argued that they had been in actual possession of the land since 1942. They therefore argued that the applicants' action for compensation had to be rejected as being time-barred.

14. The court ordered an expert report in order to determine the date of the actual taking possession of the land.

15. According to the experts' report dated 3 June 1991, it was established that the applicants' land had been subjected to land consolidation proceedings in 1981 and the Ministry of Defence had started using the land for military purposes on 21 January 1981. It was concluded that one square meter of the applicant's land was worth 4,500,000 Turkish liras (TRL).

16. On 9 July 1991 the first-instance court, relying on the experts' report, decided that the Ministry of Defence was in actual possession of the land

since 21 January 1981 and therefore the applicants were entitled to receive compensation as regards the unlawful possession of their land. It awarded the sum of TRL 1,447,920,000 of compensation to be paid to the applicants.

17. The Ministry of Defence appealed. On 21 April 1992 the Court of Cassation quashed the first-instance court's judgment on the ground that the facts of the case had not been properly established. The case file was sent back to the court of first instance for further examination.

18. On an unspecified date, the first-instance court heard witnesses on behalf of the Ministry of Defence and examined the new experts' reports submitted by them which indicated the date of actual taking possession of the land as 1942.

19. On 25 April 1996, relying on the new experts' reports and the evidence submitted by the Ministry of Defence, the Ankara Civil Court of General Jurisdiction held that the Ministry of Defence had been in actual possession of the land since 1942. It accordingly rejected the case for being introduced out of the statutory time-limit pursuant to Article 38 of the Law no. 2942. The applicants' appeal and rectification requests were rejected on 26 November 1996 and 19 March 1997 respectively.

20. Subsequently, on 24 June 1997, the Ministry of Defence brought an action before the same court and requested the transfer of the title deed to the land on behalf of the Treasury.

21. On 23 December 1998, in view of its earlier decision on the subject dated 25 April 1996, the Ankara Civil Court of General Jurisdiction accepted the request of the Ministry of Defence and ordered the land be registered in the land registry in favour of the Treasury. It reiterated that the applicants' property rights over the land in question ceased, following the expiration of the statutory time-limit provided under Article 38 of the Law no. 2942.

On 8 March 1999 the Court of Cassation upheld this decision. The applicants' request for rectification was further rejected on 18 June 1999. This decision was served on them on 2 August 1999.

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

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

23. Article 35 of the Constitution provides:

> "Everyone shall enjoy the rights of property and inheritance.
>
> These rights may not be restricted by law save in the public interest.
>
> The right of property may not be exercised to the detriment of the general interest."

The relevant part of Article 46 of the Constitution, which was applicable at the material time, provided:

> "The State and public legal entities shall be empowered to expropriate or charge with administrative easements, in the cases and according to the procedure prescribed by law and in exchange for prior compensation corresponding to the value of the expropriated property, all or part of the immovable property belonging to private individuals where the public interest so requires."

24. At the material time, under provisional Article 15 of the Constitution, it was not possible to request review of the constitutionality of legislative provisions – including Law no. 2942 of 4 November 1983 – enacted during the transitional period after the 1980 coup d'état. However, when the Constitution was amended on 3 November 2001 this derogation was repealed.

B. Law no. 2942 of 4 November 1983

25. Section 38 of the Expropriation Act (Law no. 2942 of 4 November 1983), annulled on 10 April 2003 (see below), read:

> "Extinction of rights
>
> In the case of immovable property subject to expropriation where the expropriation procedure has not ended or of immovable property whose expropriation has not been requested but which has been assigned to public-service use or on which buildings intended for public use have been erected, all the rights of owners, possessors or their heirs to bring an action relating to that property shall lapse after twenty years. Time shall begin to run on the date of the occupation of the property."

26. Law no. 221 of 5 January 1961 also governs the status of property assigned *de facto* to public-service use. Under section 1 of Law no. 221, property assigned to public-service use is deemed to have been expropriated without the expropriation procedure having been followed. Under section 4 the right to claim the value of such property lapsed after two years from the date of Law no. 221's entry into force.

27. Under the provisional section 4 of Law no. 2942, Law no. 221 applies to civil actions brought by owners or their successors in title where no final judgment has been given.

C. Case-law of the Constitutional Court

28. In a judgment given on 10 April 2003, published in the Official Gazette on 4 November 2003, the Constitutional Court unanimously declared section 38 of Law no. 2942 unconstitutional and a nullity. It gave the following grounds in particular:

> "... Expropriation, as provided for in Article 46 of the Constitution ... is a restriction of the right of property in exchange for fair prior compensation...
>
> Expropriation ... is a constitutional restriction of the right of property within the meaning of Article 35 of the Constitution. The administrative authorities may not restrict that right unlawfully in breach of the relevant legislation and the principles of expropriation. According to the provision complained of, when twenty years have passed since a *de facto* occupation, effected without going through a formal expropriation procedure ..., that unlawful act produces all the effects of a lawful expropriation and may give rise to registration of the property in the land registers in the name of the administrative authorities. However, *de facto* occupation is not provided for in the Constitution. To accept that an owner's right to bring an action lapses and that the property must be transferred to the administrative authorities twenty years after the occupation, without any consideration being given, would be contrary to the right of property and would impair the very substance of that right.
>
> For those reasons, that rule is contrary to Articles 13, 35 and 46 of the Constitution.
>
> ... Authorising the State or public legal entities to deprive private individuals arbitrarily of their right of property and their right to compensation is contrary to the principle of the rule of law.
>
> Moreover, a State governed by the rule of law must respect the universal principles of law in its acts. One of the general principles of law is the 'timeless' nature of the right of property, in other words it is not limited in time. The fact that over a period of twenty years the owners of an immovable property, their successors in title or their heirs have not enjoyed the rights in respect of that property that the Civil Code and the Code of Obligations confer on them, may be regarded as the lack of a *de facto* link with that right; it does not mean, however, that the *de jure* link has disappeared. A State governed by the rule of law must respect acquired rights in its acts...
>
> Furthermore, the European Court of Human Rights has held in numerous cases that deprivation of possessions without expropriation infringes the right of property, as guaranteed by Article 1 of Protocol No. 1. In the cases of *Papamichalopoulos v. Greece* (no. 14556/89), *Carbonara and Ventura v. Italy* (no. 24638/94) and *Belvedere Alberghiera S.R.L. v. Italy* (no. 31524/96), *de facto* occupation by the Greek navy and Italian local authorities was held to be contrary to the right of property.

> In the light of the above considerations, the provision complained of must be declared null and void, being contrary to Articles 2, 13, 35 and 46 of the Constitution."

29. Article 153 § 5 of the Constitution provides that judgments in which the Constitutional Court declares legislation null and void are not to be applied retrospectively.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

30. Reiterating their earlier objections, the government contends that the application must be dismissed for failure to exhaust domestic remedies and for non-compliance with the 6 month rule.

31. The Court notes that as it has already dismissed these objections in the admissibility decision, it does not find it necessary to reconsider. It confirms its earlier conclusion in this respect.

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

32. The applicants complained that *de facto* occupation of their land by state authorities, without paying compensation, amounted to a disproportionate interference with their property rights, in contravention of Article 1 of Protocol No. 1, 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."

33. The applicants contended that the Ministry of Defence was not in actual possession of their land since 1942. They alleged that the military activities were taking place, not on their property, but on the neighbouring plots. It was only after the land consolidation proceedings that the Ministry took possession of their land. They therefore argued that the statutory time limit provided in Article 38 of Law no. 2942 had not elapsed.

34. The Government disputed the applicants' allegations, maintaining that the Ministry had used the land in question since 1942 and therefore the time-limit had elapsed.

1. General principles

35. The Court recalls that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph authorises a deprivation of possessions only "subject to the conditions provided for by law" and the second paragraph recognises that the States have the right to control the use of property by enforcing "laws" (*Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999-II)

In this connection, the Court recalls that not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim "in the public interest", but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised (*Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, p. 26, § 69).

The requisite balance will not be found if the person concerned has had to bear "an individual and excessive burden" (*ibidem*, § 73).

36. The Court further observes that under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances not relevant for present purposes. As far as Article 1 of Protocol No. 1 is concerned, the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle (*Lithgow and Others v. the United Kingdom*, judgment of 8 July 1986, Series A no. 102, § 128).

37. The Court reiterates that the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1 of Protocol No. 1. The Article 1 does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest", such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value (*James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, § 54).

2. Application to the present case

38. At the outset, the Court notes that the parties have divergent views on the date on which the Ministry of Defence actually took possession of the applicants' land. The Court does not consider it necessary to decide on that matter. It observes that the land in dispute had been registered in the name of Mr Çökmez and then subsequently in the name of the applicants, without interruption, until 1999. The title deed was transferred to the

Treasury by the Ankara Civil Court of General Jurisdiction's judgment of 23 December 1998, which was upheld by the Court of Cassation on 8 March 1999. Therefore the decision of the domestic courts had clearly the effect of depriving the applicants of their property within the meaning of the second sentence of Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Brumărescu v. Romania* [GC], no. 28342/95, § 77, ECHR 1999-VII).

39. The Ankara Civil Court of General Jurisdiction's decision to register the land in the name of the Treasury was prescribed by law, as it was based on Article 38 of the Law no. 2942, which came into force on 4 November 1983.

40. The Court observes that Article 38 of Law no. 2942 had been annulled by the Constitutional Court's judgment of 10 April 2003. The Constitutional Court held that limiting an individual's right to property, by maintaining that his right to bring an action against *de facto* occupation of his property lapses and that arguing that the property must be transferred to the authorities twenty years after the occupation, would be contrary to the Constitution. Moreover, referring to the case-law of the Court, it held that depriving individuals arbitrarily of their right of property and their right to compensation is contrary to the principle of the rule of law.

41. The Court takes into consideration the judgment of the Constitutional Court and acknowledges its reasoning. Nevertheless, the Court notes that the judgment of the Constitutional Court does not have a retroactive effect and therefore does not provide the applicants 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, *mutatis mutandis*, *Pisano v. Italy* [GC] (striking out), no. 36732/97, § 42, 24 October 2002).

42. In addition to the conclusions of the Constitutional Court in its judgment of 10 April 2003, the Court notes that Article 38 of the Law no. 2942 provided that compensation for deprivation of property is not paid automatically by the authorities, but must be claimed by the landowner. That may prove to be inadequate protection (see, *mutatis mutandis*, *Carbonara and Ventura v. Italy*, no. 24638/94, § 67, ECHR 2000-VI). Moreover, the fact that the time-limit for claiming compensation ran from *de facto* occupation, allows the administration to benefit from a situation, already existing at the time of coming into force of the relevant law (*I.R.S. and Others v. Turkey*, no. 26338/95, § 53, 20 July 2004).

43. The Court considers that the application of Article 38 of the Law no. 2942, by the domestic authorities to the applicants' case, had the consequence of depriving them of the possibility to obtain damages for the annulment of their title (*ibidem*, § 55). In the absence of adequate compensation in exchange for their property, the interference in question, although prescribed by law, has not struck a fair balance between the

demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

44. The Court consequently concludes that there has been a violation of Article 1 of Protocol No. 1.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. 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

46. The applicants sought pecuniary compensation in the sum of 834,590 euros (EUR), which included the value of their property calculated on the basis of the experts' report used by the domestic court in its judgment of 9 July 1991 (see paragraph 15 above), the property and inheritance taxes that they have paid and the interest running from 1991 until 2005, at a rate of 50% *per annum*. Furthermore they claimed EUR 1,000,000 for their non-pecuniary damages.

47. The Government contested these sums, alleging that there was no causal link between the compensation requested and the alleged violation of the Convention. They argued that the pecuniary and non-pecuniary damages requested by the applicants had nothing to do with the economic and social realities of their country.

They maintained that according to an experts' report, dated 2 April 2004, one square meter of the neighbouring plot was valued at TRL 827,230,000. Thus, considering the inflation and the exchange rate available at the time they have submitted their observations (i.e. 1 April 2005), the Government contended that the value of the land in question is approximately EUR 162,665.

48. 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 applicants' legitimate expectations to obtain compensation. In view of the valuation of 3 June 1991 which was by a court appointed expert and the Ankara Civil Court of General Jurisdiction's decision of 9 July 1991 the Court awards the applicants EUR 373,000 for pecuniary damage.

49. As regards the applicants' claim for compensation for their non-pecuniary damages, the Court finds that, in the circumstances of the present case, finding a violation constitutes a sufficient satisfaction (*ibidem*, § 28).

B. Costs and expenses

50. The applicants claimed EUR 5,109 for their costs and expenses.
51. The Government contested the applicants' claims.
52. In the light of the information in its possession and its case-law on the subject, the Court considers it reasonable to award the applicants the sum of EUR 4,000, covering costs under all heads.

C. Default interest

53. 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. *Dismisses* the Government's preliminary objections;

2. *Holds* that there has been a violation of Article 1 of Protocol No. 1;

3. *Holds*
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 373,000 (three hundred seventy-three thousand euros) in respect of pecuniary damage and EUR 4,000 (four thousand euros) in respect of costs and expenses, plus any tax that may be chargeable, to be converted into Turkish liras at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 19 October 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President