

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

SECOND SECTION

CASE OF ELLIS v. TURKEY

(Application no. 1065/06)

JUDGMENT

STRASBOURG

4 April 2017

This judgment is final. It may be subject to editorial revision.



In the case of Ellis v. Turkey,

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

Nebojša Vučinić, *President,*
Valeriu Griţco,
Stéphanie Mourou-Vikström, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having deliberated in private on 14 March 2017,

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

PROCEDURE

1. The case originated in an application (no. 1065/06) 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 British national, Mr Robert Mackenzie Ellis ("the applicant"), on 7 December 2005.

2. The applicant was represented by Mr M. An, a lawyer practising in Ankara. The Turkish Government ("the Government") were represented by their Agent.

3. On 10 September 2015 the complaints raised under Articles 6, 13 and Article 1 of Protocol No. 1 to the Convention concerning the applicant's inability to secure the enforcement of the judgment in his favour were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

4. Further to notification under Article 36 § 1 of the Convention and Rule 44 § 1 (a), the British Government did not wish to exercise their right to intervene in the present case.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1941 and lives in Birkerod, Denmark.

6. On 11 April 1995 the applicant formed a limited company, N.R. Group Ltd. ("the company") together with a Turkish partner, N.K., to provide tourist services in Alanya, Turkey.

7. On 19 March 1997 the applicant applied to the Alanya Civil Court of First Instance to cancel N.K.'s management authority. On 2 October 1997 the court ordered the cancellation and on 18 May 1998 it appointed a trustee

for the company. Meanwhile, it was discovered that the applicant's partner N.K. had fraudulently transferred the company's assets to a new company.

8. On 8 July 1997, the applicant brought two civil cases against N.K. before the Alanya Civil Court of First Instance and sought compensation for his loss incurred due to the fraudulent acts of N.K. The court decided to join the compensation cases and to examine them together.

9. On 7 June 2005 the Alanya Civil Court of First Instance accepted the applicant's compensation claim and granted him the equivalent of 203,000 deutschmarks (DEM) (103,792 euros (EUR) at the time) with statutory interest for his loss, to be paid in Euros, and DEM 10,000 (EUR 7,158 at the time) in compensation without interest of 40% (*inkar tazminatı*), to be paid in Turkish Lira (TRY). The court further ruled that the legal costs and expenses of the proceedings were to be borne by N.K.

10. On an unspecified day the applicant requested that the judgment be served on him in order to commence enforcement proceedings. The court rejected the request, stating that it was not possible to provide the judgment unless the charge required by section 28(1) (a) of Law no. 492 (Code of Charges) had been paid.

11. The applicant was therefore unable to lodge enforcement proceedings in order to have the above-mentioned judgment executed.

II. RELEVANT DOMESTIC LAW

12. At the time of the events, section 28(1) (a) of the Law on Fees read:

> "Section 28(1) – Time-limit for the payment of fees
>
> The proportional fees set out in scale no. 1 shall be paid within the following periods:
>
> (a) One quarter of the fees for the judgment and the writ shall be paid beforehand and the rest shall be paid within two months of the judgment's delivery ... The writ shall not be served on the party concerned unless the [court] fees for the judgment and the writ of execution are paid ..."

13. Decision of the Constitutional Court and the subsequent change in section 28(1) (a) of the Law on Fees.

14. In a decision dated 14 January 2010, the Constitutional Court repealed the provision in the second sentence of section 28(1) (a). The court indicated that to put the burden of paying the court fees on the party whose case had been accepted and who had been held exempt from those very fees by the first-instance court's judgment was incompatible with the right of access to court and, in particular, with the right to have a judgment executed. In this respect, the higher court pointed out that the repealed provision referred to proportional fees, which were calculated on the basis of the main amount at issue.

15. Subsequently, in July 2010 section 28(1) (a) was amended. Following that change, the second sentence reads as follows:

> "... Failure to pay the court fees for the judgment and the writ of execution would not prevent the execution of the judgment, its service on the parties or the parties' right to have recourse to appeal proceedings."

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

16. The applicant complained that he had been unable to enforce the judgment in his favour owing to the domestic court's refusal to provide him with a copy of the said judgment. He further alleged that the non-enforcement of this judgment had violated his right to peaceful enjoyment of possessions. In this connection, he invoked Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 to the Convention.

17. The Government contested that argument.

A. Admissibility

18. The Government argued that the applicant's complaint concerning the non-enforcement of the judgment delivered in his favour should be rejected for non-exhaustion of domestic remedies. In this connection, they pointed out that following the decision of the Constitutional Court, which repealed the provision in the second sentence of section 28(1) (a) of Law on Fees, in July 2010 the legislation was amended and the applicant had thus the possibility of obtaining the execution of the impugned judgment.

19. The Court notes that the impugned judgment was delivered by the first instance court in 2005 and that the applicant had been unable to enforce the judgment in his favour owing to the domestic court's refusal to provide him with a copy of the said judgment for an excessive period of time (see *Sevgül Altıparmak v. Turkey*, no. 27023/06, § 25, 20 July 2010).

20. The Court consequently dismisses the Government's objection regarding the issue of exhaustion of domestic remedies.

21. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Article 6 § 1 of the Convention

22. The Court reiterates that Article 6 § 1 of the Convention secures to everyone the right to have any claim relating to his or her civil rights and obligations brought before a court or tribunal; in this way it embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6 § 1 (see *Hornsby v. Greece*, 19 March 1997, § 40, *Reports of Judgments and Decisions* 1997-II, and *Ülger v. Turkey*, no. 25321/02, § 38, 26 June 2007).

23. In so far as enforcement proceedings constitute an integral part of the trial, the Court considers that the right to a court, along with access to first-instance and appeal courts for the determination of "civil rights and obligations" (see *Kreuz v. Poland*, no. 28249/95, §§ 53-54, ECHR 2001-VI), equally protects the right of access to enforcement proceedings (see *Ülger*, cited above, § 39).

24. In the present case, the applicant was awarded compensation by the judgment of the Alanya Civil Court of First Instance. However, he could not secure the enforcement of that judgment as the required court fees, which the domestic court had imposed on the defendant party, were never paid.

25. In this connection, the Court reiterates that the right to access to a court is not absolute but may be subject to limitations; these are permitted by implication, since the right of access by its very nature calls for regulation by the State. However, the Court must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Apostol v. Georgia*, no. 40765/02, § 57, ECHR 2006-XIV, and *Ülger*, cited above, § 41).

26. The Court further reiterates that, in order to determine whether or not a person enjoyed the right of access, the amount of the fees requested must be assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them, and the phase of the proceedings at which that restriction has been imposed (see *Apostol*, cited above, § 59).

27. The Court notes that, by invoking section 28 (1)(a) of the Law on Fees, the domestic court imposed on the applicant a financial obligation,

failure to comply with which barred his access to the judgment concerning his compensation claims and thus to the further enforcement proceedings. Accordingly, that obligation, which should have been borne by the other party and which was imposed on the applicant at the enforcement stage, constituted a restriction of a purely financial nature and therefore calls for particularly rigorous scrutiny from the point of view of the interests of justice (see *Apostol*, cited above, § 60, and *Osman Yılmaz v. Turkey*, no. 18896/05, § 41, 8 December 2009). In this connection, the Court takes account of the Constitutional Court's decision dated 14 January 2010, which repealed the provision in the second sentence of section 28 (1)(a). It notes that the higher court found the said provision incompatible with the right of access to court, as it imposed the obligation to pay the court fees on the party whose case had been accepted and who was not legally liable for such fees pursuant to the judgment.

28. Moreover, the Court reiterates that the fulfilment of the obligation to secure effective rights under Article 6 § 1 of the Convention does not only mean the absence of interference but may also require positive action on the part of the State (see *Kreuz*, cited above, § 59). It considers that by shifting to the applicant the full responsibility to meet the court costs, the State avoided its positive obligation to organise a system for the enforcement of judgments which is effective both in law and in practice (see *Fuklev v. Ukraine*, no. 71186/01, § 84, 7 June 2005, and *Osman Yılmaz*, cited above, § 42). Thus, some consideration should also have been given in the present case to the reasonable relationship of proportionality between the payment of the court costs and the work required for the task in hand, namely merely providing the applicant with a copy of the judgment.

29. Accordingly, the Court finds that holding the applicant responsible for payment of the charges before he could receive a copy of the judgment imposed an excessive burden on him and restricted his right of access to a court to such an extent as to impair the very essence of that right.

30. There has accordingly been a violation of Article 6 § 1 of the Convention.

2. Article 1 of Protocol No. 1 to the Convention

31. The Court reiterates that a "claim" may constitute a "possession" within the meaning of Article 1 of Protocol No. 1 if it is sufficiently established so as to be enforceable (see *Burdov v. Russia*, no. 59498/00, § 40, ECHR 2002-III). The judgments delivered by the Sinop Civil Court of General Jurisdiction in the compensation proceedings brought by the applicants provided them with enforceable claims.

32. It follows that the impossibility for the applicant to secure the judgment enforced constituted an interference with his right to the peaceful enjoyment of his possessions, as set forth in the first sentence of the first paragraph of Article 1 of Protocol No. 1 (see *Ülger*, cited above, §§ 49-50).

33. In the absence of any justification for that interference, the Court concludes that there has also been a violation of Article 1 of Protocol No. 1.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

34. Relying on Article 13 of the Convention, the applicant reiterated his complaints that the judgment in his favour had not been executed.

35. The Court notes that this complaint is linked to those examined above and must therefore be declared admissible. However, having regard to the violations found under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 to the Convention, the Court does not consider it necessary to examine separately the applicant's allegation under this head.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

A. Damage

36. The applicant claimed 345,378 euros (EUR) in respect of pecuniary and EUR 100,000 non-pecuniary damage.

37. The Government contested the claims.

38. As regards the pecuniary damage, the Court observes that following the amendments in domestic legislation, the applicant has now the possibility of having the impugned judgment executed and to obtain the payment of the outstanding debt arising out of that judgment. The Court therefore considers that the most appropriate form of redress would consist in removing the obstacles to enforcement by taking all necessary measures to ensure that the writ of execution can be issued (see *Sevgül Altıparmak v. Turkey*, no. 27023/06, § 33, 20 July 2010, and *Çakır and Others v. Turkey*, no. 25747/09, §§ 30-31, 4 June 2013).

39. As regards non-pecuniary damage, the Court considers that the applicant must have suffered distress and frustration resulting from the lengthy period of non-enforcement of domestic court decision in his favour, which according to its well-established case-law, cannot be compensated for solely by the finding of a violation of the Convention. Ruling on an equitable basis, as required by Article 41 of the Convention, it decides to award EUR 7,200 under this head.

B. Costs and expenses

40. The applicant also claimed EUR 55,431 for the costs and expenses incurred before the Court.

41. The Government contested the claim.

42. According to the Court's case-law, an applicant is entitled to 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. Regard being had to the documents in its possession and to its case-law, the Court considers it reasonable to award the sum of EUR 3,000 covering costs under all heads.

C. Default interest

43. The Court considers it appropriate that the default interest rate 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 has been a violation of Article 1 of Protocol No. 1 to the Convention;

4. *Holds* that there is no need to examine the complaint under Article 13 of the Convention;

5. *Holds*
   (a) the respondent State shall, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, remove the obstacles to the enforcement of the impugned judgment, by taking all necessary measures to ensure that the writ of execution can be issued.
   (b) that the respondent State is to pay the applicant, within three months the following amounts, **to be converted into the currency of the respondent State** at the rate applicable at the date of settlement:
      (i) EUR 7,200 (euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 3,000 (euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (c) 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;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 4 April 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı Deputy Registrar	Nebojša Vučinić President