

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

SECOND SECTION

CASE OF KOCAMAN v. TURKEY

(Application no. 77043/12)

JUDGMENT

STRASBOURG

24 November 2020

This judgment is final but it may be subject to editorial revision.



In the case of Kocaman v. Turkey,

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

Aleš Pejchal, *President,*
Egidijus Kūris,
Carlo Ranzoni, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having regard to:

the application (no. 77043/12) 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 Kemal Kocaman ("the applicant"), on 5 October 2012;

the decision to give notice of the application to the Turkish Government ("the Government");

the parties' observations;

Having deliberated in private on 3 November 2020,

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

INTRODUCTION

The case concerns the alleged violation of the applicant's right of access to a court because of the national courts' omission to render a decision in the applicant's case against one of the opposing parties to the proceedings.

THE FACTS

1. The applicant was born in 1959 and lives in İzmir. He was represented by Mr G. Yolyapan, a lawyer practising in İzmir.

2. The Turkish Government ("the Government") were represented by their Agent.

3. The facts of the case, as submitted by the parties, and as they appear from the documents submitted by them, may be summarised as follows.

I. THE PROCEEDINGS BEFORE THE İZMIR CONSUMER COURT AND THE COURT OF CASSATION

4. The applicant brought compensation proceedings in two separate cases against a construction company, *P. İnşaat ve Gıda Sanayi Tic. Ltd. Şti.* (hereafter "the Company"), and the Company's representative, U.P., before the İzmir Consumer Court (hereafter "the Consumer Court"). In his petition, the applicant submitted that he had purchased a house from the Company and U.P. but that they had failed to complete the construction work in accordance with the terms of the contract. The applicant further stated that U.P. was jointly and severally liable with the company since he was one of

the signatories to the contract in the capacity of entrepreneur of the construction project.

5. On 31 March 2010 the Consumer Court joined the two cases, considering that there were *de facto* and *de jure* links between them.

6. On 30 June 2011, the Consumer Court ruled in favour of the applicant and ordered the Company to pay him compensation. However, the Consumer Court did not deliver any ruling in respect of U.P.

7. On 2 August 2011 the Company appealed against the Consumer Court's judgment. The Company's appeal was served on the applicant on 8 August 2011.

8. On 5 September 2011 the applicant filed a cross-appeal (*katılma yolu ile temyiz*) in which he maintained that the Consumer Court's judgment had to be overruled as it had not delivered a ruling concerning U.P. He argued in that connection that he had signed the contract with U.P., who should also have been held liable for compensation.

9. On 22 December 2011 the Court of Cassation upheld the judgment at first instance.

10. On 19 March 2012 the applicant petitioned for rectification of the Court of Cassation's decision, arguing once more that the first-instance court had omitted to render a decision in respect of U.P.

11. On 20 June 2012 the Court of Cassation dismissed the applicant's request for rectification.

12. It appears from the documents of the case file that the applicant did not receive the amount of compensation awarded by the national courts because, at the material time, the company had been placed in liquidation.

II. DEVELOPMENTS AFTER THE INTRODUCTION OF THE APPLICATION

13. In their observations, the Government informed the Court of the following. On 11 May 2018 the İzmir Chief Public Prosecutor requested a copy of the case file from the Consumer Court in order to transfer it to the Ministry of Justice so that the Government could present their observations to the Court in the context of the application lodged by the applicant.

14. Upon the above-mentioned request of the İzmir Chief Public Prosecutor, the Consumer Court decided to re-examine the case on its own initiative. The Consumer Court first disjoined the case brought against U.P. and then notified the parties of the date of the hearing.

15. On 28 June 2018 the Consumer Court dismissed the applicant's case against U.P. for incompatibility *ratione personae*. In its reasoned judgment, the Consumer Court stressed that it had erroneously omitted to render a judgment in respect of U.P. Referring mainly to the case-law of the Court of Cassation, it further noted that it was possible to re-examine a case

concerning a party in respect of which no judgment had been pronounced (see paragraph 20 below).

16. On 3 July 2018 the applicant filed an appeal against this judgment. The proceedings are still pending before the Court of Cassation.

RELEVANT LEGAL FRAMEWORK

17. Article 388 § 2 of the Code of Civil Procedure (Law no. 1086), which was in force at the material time, provided that in the concluding section of their judgments the civil courts had to indicate clearly for each claim the liabilities imposed on and the rights granted to the parties, in a manner that did not give rise to any suspicion or doubt. Article 297 § 2 of the new Code of Civil Procedure ("Law no. 6100") which entered into force on 1 October 2011 contains a similar provision to the one in Law no. 1086.

18. By virtue of the provisions of Articles 426/G and 426/H of Law no. 1086, it was possible for a party to cross-appeal against a decision by means of a petition in reply filed within fifteen days of the date on which the opposing party's petition for appeal was communicated to him or her.

19. Article 175 of Law no. 1086 provided that the operation of the courts was suspended between 1 August and 5 September.

Article 177 of Law no. 1086 stipulated that an additional period of seven days had to be added at the end of the recess period, without the need for a judicial decision, if a time-limit prescribed in Law no. 1086 coincided with the recess period.

20. The Government submitted that in the event of no ruling being pronounced in respect of one of the parties to the proceedings, the first instance courts could re-examine the case and render a decision as regards the party in respect of which no ruling had been made. The Government submitted examples from the case-law of the Court of Cassation in which it was emphasised that a case cannot be deemed to have become final if a court omits to render a decision concerning a claim or in respect of a party to proceedings (see, in particular, the decision of the Civil Chamber of the Court of Cassation of 29 April 2010, 2010/3736 E., 2010/7646 K).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

21. The applicant complained that he had been deprived of his right to the determination of his dispute because the national courts had omitted to render a decision in respect of one of the opposing parties.

22. The Court considers that the complaint concerns the applicant's right of access to a court as guaranteed by Article 6 § 1 of the Convention, the relevant parts of which provide as follows:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

A. Admissibility

1. Applicant's victim status and the abuse of the right of individual application

23. The Government contested the applicant's victim status. They argued that the applicant could no longer claim to be a victim of the alleged violation since the Consumer Court had re-examined on its own initiative the case between the applicant and U.P. The Government further argued that the Consumer Court had re-examined the case in one month in order to remedy the unlawfulness as quickly as possible. Finally the Government considered that the applicant had abused his right of individual application by not informing the Court of those new developments (see paragraphs 13 to 16 above).

24. The applicant maintained his arguments.

25. The Court reiterates that a decision or measure favourable to the applicant is not, in principle, sufficient to deprive him or her of his or her status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, for example, *Eckle v. Germany*, 15 July 1982, § 69 and seq., Series A no. 51; *Amuur v. France*, 25 June 1996, § 36, *Reports of Judgments and Decisions* 1996‑III; *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999‑VI; and *Jensen v. Denmark* (dec.), no. 48470/99, ECHR 2001‑X).

26. The Court is ready to accept that the national authorities have acknowledged, at least in substance, a breach of the Convention, recognising that the failure to render a decision in respect of U.P. had created an unlawful situation (see paragraph 15 above).

27. The Court has to assess whether the first-instance court's re-examination of the case in respect of U.P. could be deemed adequate redress for the breach of the Convention.

28. The Court observes that it took almost eight years for the applicant to have a determination of his dispute at the first-instance level. In this respect, the Court notes that the proceedings are still pending and that the national courts have not rendered a final judgment in the applicant's case. The Court further notes that no reference to any possible redress has been made by the domestic courts and no compensation has been offered to the applicant in respect of the alleged violation of the Convention. In these circumstances, the Court remains unconvinced that the re-examination of the case and delivery of a judgment at the first-instance level could – at the moment of the examination of the present application by the Court – be considered adequate redress that may deprive the applicant of his victim

status. The Government's argument on this point should therefore be dismissed (see, *mutatis mutandis*, *Yusifova v. Azerbaijan*, no. 25315/08, 18 December 2012).

29. The Court further reiterates that, under Article 35 § 3 of the Convention, an application may be rejected as an abuse of the right of individual application if, among other reasons, it was knowingly based on untruths. The submission of incomplete and thus misleading information may also amount to an abuse of the right of application, especially if the information concerns the very core of the case and no sufficient explanation has been provided for the failure to disclose that information. The same applies if new, important developments have occurred during the proceedings before the Court and where, despite being expressly required to do so by Rule 47 § 7 of the Rules of Court, the applicant has failed to disclose that information to the Court, thereby preventing it from ruling on the case in full knowledge of the facts. However, even in such cases, the applicant's intention to mislead the Court must always be established with sufficient certainty (see *Gross v. Switzerland* [GC], no. 67810/10, § 28, ECHR 2014, with further references).

30. Turning to the circumstances of the present case, the Court does not find it established with sufficient certainty that the applicant intended to mislead the Court by failing to provide information about the new developments in his case.

31. Having regard to the above considerations, the Court rejects the Government's plea that the application be dismissed as abusive and that the applicant had lost his victim status.

2. Non-exhaustion of domestic remedies

32. Lastly, the Government raised a plea of non-exhaustion of domestic remedies arguing that, in the course of the first set of proceedings, the applicant had failed to submit his cross-appeal in his reply submissions within the prescribed time-limit. The Government maintained that the time-limits determined by Law no. 1086 for filing reply submissions before the Court of Cassation had remained unchanged during the recess period.

33. The Court notes that according to Law no. 1086, which was in force at the material time, it was possible for the parties to a case to file appeal petitions and reply submissions during the recess period. However, Article 177 of Law no. 1086 indicates that the limits prescribed by law were extended for an additional seven days following the end of the recess period (see paragraph 19 above). The Court observes in this respect that the applicant had submitted his cross-appeal in accordance with the time-limits prescribed by Law no. 1086. More importantly, the Court of Cassation had not found that the applicant had missed the time-limit for filing his cross-appeal. Thus, the Government's argument on this point should also be dismissed.

B. Merits

34. The applicant argued that he was deprived of his right of access to a court as a result of the Consumer Court's failure to render a decision in his case against one of the opposing parties.

35. The Government submitted that the applicant had had access to a court as the Consumer Court had reviewed the case and issued a decision in respect of U.P. as soon as it found that it had failed to do so when it had adopted its judgment of 30 June 2011 (see paragraph 6 above). The Government also maintained that the Consumer Court had rendered its decision in a very short period in order to remedy the unlawfulness expeditiously.

36. The Court reiterates that the right of access to a court is an inherent aspect of the safeguards enshrined in Article 6. It secures to everyone the right to have a claim relating to his civil rights and obligations brought before a court (see *Cudak v. Lithuania* [GC], no. 15869/02, § 54, ECHR 2010). Moreover, it includes not only the right to institute proceedings but also the right to obtain a determination of the dispute by a court (see, for example, *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 86, 29 November 2016).

37. The Court points out that the right of access to a court also protects the implementation of final, binding judicial decisions which, in States that accept the rule of law, cannot remain inoperative to the detriment of one party (see *Hornsby v. Greece*, judgment of 19 March 1997, *Reports* 1997-II, pp. 510-11, § 40). The Court emphasises that it would be inconceivable for Article 6 § 1 to describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without guaranteeing the parties that their civil disputes will be finally determined (see, *mutatis mutandis*, *Sukhorubchenko v. Russia*, no. 69315/01, § 43, 10 February 2005, and *Baškienė v. Lithuania*, no. 11529/04, § 79, 24 July 2007).

38. Before embarking on its examination, the Court considers it useful at the outset to point out several elements on the facts of the case. The applicant's compensation claims filed against the Company and U.P., on 1 February 2010 and 29 March 2010 respectively, were joined by the Consumer Court, considering that they were linked *de jure* and *de facto*. However, as a result of a judicial error the Consumer Court omitted to render a decision in respect of U.P. The applicant complained about this issue before the Court of Cassation in vain. The Court notes that it was only after being made aware of the applicant's application to the Court that the Consumer Court recognised its omission and delivered its decision in respect of U.P.

39. The Court notes the Court of Cassation's case-law according to which a case cannot be deemed to be final unless the competent court renders a decision in respect of all claims and parties to the proceedings (see

paragraph 20 above). Accordingly, the Court observes that the case filed by the applicant against U.P. remained unexamined for more than six years and that a final decision has not yet been adopted by the national courts. The Court notes in that connection that more than ten years have elapsed since the introduction of the applicant's compensation claims before the domestic courts. The Court further notes that the length of the period of inactivity, if it is attributable to the national authorities, is an element which must be taken into account in the determination of State responsibility under Article 6. In *Baškienė v. Lithuania* (cited above, §§ 78-82) it found a violation of the applicant's right to access to a court, under Article 6 § 1 of the Convention, in so far as the applicant had to wait more than seven years to be told that the judicial authorities had decided not to examine her civil action in the context of a criminal case. In *Kutić v. Croatia* (no. 48778/99, §§ 28-32, 1 March 2002), the Court found that the applicant's right to have his claims determined was breached, given that the proceedings before the national courts had been stayed for many years by operation of law.

40. Turning to the present case, the Court is convinced that the national authorities are solely responsible for the long period during which the applicant's claims against U.P. remained unexamined, as recognised by the Consumer Court in its reasoned decision of 28 June 2018 (see paragraph 15 above). The Court also notes that the national courts have not so far rendered a final decision regarding the case filed against U.P. Under these circumstances, the Court cannot agree with the Government's contention that the Consumer Court has re-examined the case in an expeditious manner after having recognised that it had mistakenly omitted to adopt a decision in respect of U.P.

41. The Court finds, therefore, that the long period for which the applicant has been prevented from having his civil claims determined by the domestic courts as a consequence of a judicial error entailed a violation of Article 6 § 1 of the Convention (see, *mutatis mutandis*, *Baškienė*, and *Kutić*, both cited above).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. 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."

43. The applicant claimed amounts in respect of pecuniary and non-pecuniary damage allegedly incurred as a result of the proceedings before the domestic courts. The applicant claimed 21,331 euros (EUR) in

respect of costs and expenses and EUR 50,000 in respect of non-pecuniary damage.

44. The Government submitted that the sums in question were excessive and unfounded.

45. The Court finds no causal link between the violation complained of and the pecuniary damage alleged. It cannot speculate on the outcome of the proceedings had they been in conformity with Article 6.

However, it accepts that the violation has caused the applicant non-pecuniary damage which cannot be made good by the mere finding of a violation. Making its assessment on an equitable basis, and having regard to the circumstances of the case, the Court awards the applicant EUR 1,500 in compensation for non-pecuniary damage.

46. 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*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 1,500 (one thousand five hundred euros) in respect of non-pecuniary damage, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, together with any tax that may be chargeable;
   (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.

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

Done in English, and notified in writing on 24 November 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı	Aleš Pejchal
Deputy Registrar	President