CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 35045/97
by VOYAGER LIMITED
against Turkey

The European Court of Human Rights (First Section), sitting on 4 September 2001 as a Chamber composed of

Mrs E. PALM, *President*,
Mr L. FERRARI BRAVO,
Mr GAUKUR JÖRUNDSSON,
Mr R. TÜRMEN,
Mr B. ZUPANČIČ,
Mr T. PANȚÎRU,
Mr R. MARUSTE, *judges*,
and Mr M. O'BOYLE, *Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 30 August 1996 and registered on 24 February 1997,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having deliberated, decides as follows:

THE FACTS

The applicant company Voyager Ltd. (hereinafter the applicant) is a limited liability company incorporated under the laws of the Isle of Man. It is represented before the Court by Cameron Markby Hewitt, a firm of solicitors in London.

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

The applicant is a subsidiary company of Polly Peck International ("PPI"). Mr Asil Nadir was the director of PPI from 1980 until he was declared bankrupt in 1991. In October 1990, the applicant owned 32,000 of the 40,000 shares in AN Graphics A.Ş., a company registered in İstanbul and incorporated in accordance with Turkish law.

On 16 October 1990, a meeting of the applicant's Board of Directors was held in Cyprus. The Articles of Association of the applicant provided that the quorum for a board of directors' meeting is two. However, this meeting was only attended by Mr Tunalıer, a director of the applicant, and Mr Nevzat, a former director of the applicant, who had formally resigned from his post a day before the meeting. The other two directors of the applicant were not informed about this meeting. At this meeting a decision was taken to appoint Mr Aziz as director of Voyager. On 21 October 1990 another Board of Directors' meeting was held in Cyprus, this time in the presence of Mr Tunalıer and Mr Aziz. At this meeting, the transfer of 32,000 shares held by the applicant in AN Graphics to Mr Nadir for a payment of GBP 8,000,000 was ratified. Consequently, the applicant's 32,000 shares in AN Graphics were registered in the share register in the name of Mr Nadir.

On 25 October 1990 an Administrative Order was made by the English courts in respect of PPI whereby two administrators were appointed to act as the company's officers.

On 25 November 1991 Mr Nadir was made bankrupt in accordance with English law.

On 5 November 1992 the High Court of Justice of the Isle of Man declared that the meetings of the applicant's Board of Directors held respectively on 16 October 1990 and 21 October 1990 were inquorate and therefore null and void.

The applicant accused Mr Nadir of wrongful transfer of shares with the intention of transferring them outside the PPI Group to ensure that they remained under his personal control after the Administration Order became effective on 25 October 1990. Consequently several proceedings were brought before the Turkish courts against AN Graphics and Mr Asil Nadir.

(a) Proceedings before the Turkish courts to establish the applicant's ownership to the 23,112 shares in AN Graphics

On 2 September 1991 the applicant initiated legal proceedings before the İstanbul Commercial Court for a declaration that 23,112 of its shares in AN Graphics had been unlawfully transferred into the name of Mr Nadir.

On 26 February 1993, after having examined all the evidence and the arguments submitted by the parties, the court found that there was no dispute between the parties concerning the nullity of the Board meetings held on 16 October 1990 and 21 October 1990. Accordingly, the Court held that the transfer of 23,112 shares into the name of Mr Nadir was null and therefore void. The court further ruled that the restoration of the shares in the applicant's name was dependent on the payment of GBP 5,778,000 to Mr Nadir, this sum being fixed in the light of the minutes of the meeting of the Board of Directors held on 21 October 1990.

The applicant appealed. On 31 March 1994 the Court of Cassation upheld the decision of the first instance court as regards the nullity of the share transfer. However, it quashed the remainder of the judgment concerning the obligation to pay back GBP 5,778,000 to Mr Nadir to restore the shares, on the ground that Mr Nadir had not made such a claim before the first instance court.

Subsequently, Mr Nadir requested the rectification of the decision dated 31 March 1994. On 27 October 1994 the Court of Cassation found that the Commercial Court's decision, dated 26 February 1993, was in fact in line with the established case-law of the Court of Cassation, which provides that first instance courts are entitled, *ex officio*, to establish a lien even though the parties do not make such a claim. Thus, the Court of Cassation concluded that the first instance court had acted in accordance with domestic law in establishing a lien over the shares in favour of the defendant. Accordingly, it ruled that the reasoning of the Court of Cassation's decision dated 31 March 1994 was erroneous. However, the court further held that, as there was a dispute between the parties about the payment of GBP 5,778,000, the first instance court should have first examined in detail whether the defendant had really paid the sum in question before ruling on a lien in respect of the shares. In view of its findings, the court remitted the case to the first instance court for a detailed examination.

On 23 January 1995 the Commercial Court decided to apply the Court of Cassation's decision of 27 October 1994. Recalling that under Turkish law the conditions which apply to share transfer are regulated by the provisions governing the contract of sale in the Code of Obligations, the court placed the burden of proof on the applicant to show that it had not received any consideration from the defendant in return for the shares. The court granted

one month to the applicant to submit any evidence in support of its allegations. However, the applicant stated before the court that it did not have any proof. Accordingly, on 24 March 1995 the Commercial Court held that pursuant to the Code of Obligations, the vendor and the purchaser should fulfil their contractual obligations at the same time unless there was an agreement to the contrary. The court observed that the defendant claimed to have paid the sum in question to the applicant in return for the shares and that, according to Turkish domestic law, the burden of proof was on the applicant to show that its allegations were true. Accordingly, the court accepted that the defendant had paid GBP 5,778,000 in return for the shares and was therefore entitled to a lien on the shares until this sum was paid back to him.

On 19 October 1995, finding the reasoning and the cogency of the first instance court in line with domestic law, the Court of Cassation rejected the applicant's appeal.

On 9 February 1996 the Court of Cassation dismissed the applicant's request for rectification. It held that the transfer of limited liability company shares was governed by Article 182 of the Code of Obligations and therefore the burden of proof was on the applicant to show that it had not received any consideration in return for the shares. As the applicant failed to do so, the Court of Cassation held that the decisions of the Commercial Court and the Court of Cassation were in line with domestic law. This decision was served on the applicant on 13 March 1996.

(b) Proceedings before the Turkish courts to establish the applicant's ownership to the 8,888 shares in AN Graphics

On 25 February 1992 the applicant filed a further application with the İstanbul Commercial Court for a declaration that 8,888 of its shares in AN Graphics had been unlawfully transferred into the name of Mr Nadir.

On 24 March 1995 the Commercial Court ruled that the transfer of 8,888 shares to Mr Nadir by the applicant was null and void. The court further held that pursuant to Article 182 of the Code of Obligations, the burden of proof was on the applicant to show that no consideration had been received from the defendant in return for the shares. As the applicant failed to adduce any evidence in support of its allegations, the Commercial Court granted the defendant a lien over the shares and made the restoration of shares dependent on the payment of GBP 2,222,000.

On 19 October 1995 the Court of Cassation, finding the cogency and reasoning of the first instance court in line with domestic law, upheld the judgment dated 24 March 1995.

On 25 December 1995 the applicant requested the rectification of this decision. Subsequently, on 7 March 1996 the Court of Cassation dismissed the applicant's requests, stating that the transfer of shares was governed by

Article 182 of the Code of Obligations and the national courts had acted in accordance with this provision.

(c) Other proceedings relevant to the case

On 21 February 1996 the Isle of Man High Court granted a declaration that the applicant had never received payment from Mr Nadir for the transfer of 32,000 shares in AN Graphics.

In addition to the principal proceedings described in subsection (a) and (b) above, the applicant also initiated an action to establish and enforce its rights as a shareholder in AN Graphics including its right to participate in shareholders' meetings. On 22 May 1995 the İstanbul Commercial Court dismissed the case. It recalled that pursuant to Article 417 of the Commercial Code, only the persons whose names are registered in the share register could be considered shareholders. The court observed that the applicant's name was not registered in the share register and that no proceedings had been brought to amend the share register. Accordingly, the court ruled that the applicant was not entitled to convene a shareholders' meeting. This decision was upheld by the Court of Cassation on 4 October 1996. The applicant asked for rectification of this decision. During these proceedings, the applicant also requested disqualification of three of the members of the Court of Cassation. The applicant maintained that these three judges had previously sat in the proceedings concerning the establishment of the applicant's ownership to the 8,888 shares in AN Graphics, and had acted in favour of Mr Nadir. On 4 October 1996 the Court refused the applicant's request basing itself on Article 39 of the Court of Cassation Act, which provides that motions for disqualification will not be heard where disqualification can result in the loss of quorum. On the same day, the court also refused the applicant's request for rectification.

COMPLAINTS

1) The applicant highlights several complaints under Article 6 of the Convention and alleges that it did not have a fair trial before the Turkish courts.

(a) The applicant considers that it did not have the benefit of impartial proceedings before the Turkish courts. Referring to the affidavit sworn by Mr Aziz and the decision of the Isle of Man High Court dated 21 February 1996, the applicant alleges that the domestic courts refused to give any weight to the evidence submitted by the applicant.

(b) The applicant further submits that neither the Court of Cassation nor the first instance courts gave adequate reasons for refusing to take into account the evidence submitted by the applicant.

(c) Moreover, the applicant alleges that the domestic proceedings which lasted almost five years exceeded the reasonable time limit required by Article 6 of the Convention.

(d) The applicant maintains that the refusal of the Court of Cassation to hear the applicant's request for disqualification of three of the judges of the Court of Cassation constituted a breach of Article 6 of the Convention.

2) The applicant further complains under Article 13 of the Convention that it has not been able to enforce its rights before the Turkish courts and it was not granted an effective remedy by the Turkish courts. The applicant further alleges that it did not have the opportunity to challenge the denial of its right to an impartial hearing.

3) The applicant submits under Article 1 of Protocol No. 1 to the Convention that the imposition of a condition on the re-registration of its 32,000 shares is a deprivation of its ability to sell or transfer these shares or to use them as collateral. The applicant maintains that the decisions of the national courts amount to an unjustified control of its property rights. It further submits that the national courts' misinterpretation of domestic law and evaluation of evidence constitutes a violation of Article 1 of Protocol No. 1 to the Convention.

THE LAW

1. The applicant complains that it was in several aspects denied a fair trial and invokes Article 6 of the Convention, which provides, as relevant:

> "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. (...)

(a) As regards the applicant's allegation that the national courts did not give any weight to the submissions of the applicant, the Court notes that the requirements inherent in the concept of "fair hearing" are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge. The Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases. Nevertheless, certain principles concerning the notion of a "fair hearing" in cases concerning civil rights and obligations emerge from the Court's case-law. Most significantly for the present case, it is clear that

the requirement of "equality of arms", in the sense of a "fair balance" between the parties, applies in principle to such cases as well as to criminal cases as regards litigation involving opposing private interests. As regards litigation involving opposing private interests, "equality of arms" implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent. It is left to the national authorities to ensure in each individual case that the requirements of a "fair hearing" are met (see the Dombo Beheer BV v. the Netherlands judgment of 27 October 1993, Series A no. 274-B, p. 19, §§ 32-33).

In this connection, the Court notes that the applicant was legally represented throughout the whole domestic proceedings and had ample opportunity to make submissions in furtherance of its complaints against AN Graphics and Mr Nadir. The Court observes that it is clear from the case file that, although the court granted the applicant one month to submit any written evidence in support of its allegations, the applicant failed to do so. Moreover, pursuant to Turkish civil procedure, evidence may only be submitted in proceedings before the first instance courts. Where a decision is appealed no further evidence may be submitted. In this respect, it should be emphasised that the Isle of Man High Court's decision, which indicates that the applicant did not receive any consideration in return for the shares, was delivered on 21 January 1996, which is later than the decisions of the first instance courts and, indeed, later than the final decision concerning the disputed 23,112 shares.

As regards the applicant's challenge to the impartiality of the Turkish courts, the Court notes that there is nothing in the case-file which would cast doubt on the impartiality of the domestic courts which heard the applicant's case.

Accordingly, this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

(b) As regards the applicant's complaint concerning the length of proceedings, the Court notes that the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in the established case-law, in particular the complexity of the case and the conduct of the applicant and the relevant authorities. Furthermore, the Convention organs make an overall assessment of the length of proceedings in some cases (Ciffola v. Italy, judgment of 27 February 1992, Series A 231, p. 9, § 14). The Court notes that the present case clearly involved complex issues of fact and law. Moreover, the proceedings concerning the restitution of 23,112 shares commenced in September 1991 and ended in February 1996, and the national courts delivered six judicial decisions in four years and five

months. As regards the proceedings concerning the restitution of 8,888 shares, the Court notes that these proceedings were initiated in February 1994 and ended in March 1996, and the national courts delivered three judicial decisions in almost four years. Furthermore, there is nothing in the case file to indicate a period of inactivity that is attributable to the Turkish authorities. Consequently, the Court considers that the length of the two proceedings in the instant case did not exceed the reasonable time required by the Convention.

It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

(c) As regards the applicant's complaint that the national courts did not give sufficient reasons for their decisions, the Court accepts that the absence of reasons in a court decision might raise an issue as to the fairness of the procedure which is guaranteed by Article 6 § 1 of the Convention. However, in the case of Hiro Balani v. Spain (judgment of 9 December 1994, Series A no.303, pp. 23-37, § 27), the Court held that while Article 6 § 1 obliges the courts to give reasons for their judgments, it cannot be understood as requiring a detailed answer to every argument. The extent to which the duty to give reasons applies may vary according to the nature of the decision. It is, moreover, necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing in States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of each case.

In the present case, the Court observes that the first instance courts delivered lengthy judgments, giving detailed reasons as to why they decided to establish a lien over the shares. Moreover, it is also clear from the Court of Cassation's decisions that the courts did in fact consider the applicant's arguments and found no objection to the İstanbul Commercial Courts judgments.

Accordingly, this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

(d) In so far as the applicant complains of the refusal of the Court of Cassation to hear the applicant's request for disqualification of three of the judges of the Court of Cassation, the Court notes that although there was a factual nexus between the two appeals heard by the Court of Cassation, they related to different questions. Admittedly, three of the five members of the Court of Cassation who had sat in the first case took part in the second, but

this in itself is not reasonably capable of giving rise to legitimate doubts as to the impartiality of the Court of Cassation. It is in fact common in the Convention countries that higher courts deal with similar or related cases in turn (Gillow v. the United Kingdom, Series A, No. 109, p.28, § 73).

Accordingly, the Court considers that it cannot be concluded that the rejection of the applicant's request for disqualification of the three judges of the Court of Cassation, who had previously sat in the proceedings concerning the restitution of the disputed 8,888 shares, gives rise to any appearance of a breach of Article 6 of the Convention.

It follows that this part of the application is mmanifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

2) The applicant invokes Article 13 of the Convention which provides:

> "Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

As regards the applicant's complaint under Article 13, the Court recalls that this Article applies only where an individual has "an arguable claim" to be the victim of a violation of a Convention right. It has found above that the applicant's complaints under Article 6 are manifestly ill-founded as there is no appearance of a violation of that Article. For similar reasons the Court holds that the applicant did not have an arguable claim for the purposes of Article 13, and Article 13 of the Convention is therefore inapplicable to this case.

This part of the application is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

3) The applicant alleges a breach of Article 1 of Protocol No. 1 to the Convention, which provides:

> "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."

As regards the complaint raised under Article 1 of Protocol No. 1 to the Convention, the Court recalls that the deprivation of property referred to in Article 1 of Protocol No. 1 to the Convention primarily concerns expropriation of assets for public purposes, and not the determination of rights in disputes between private persons (No. 1302/87, Dec. 8.9.1988, DR 57, § 268).

In the present case, the applicant's alleged loss of property was the result of a transaction between private persons under private law and of court decisions relating to the validity of that transaction.

The fact that the State through its judicial system provided a forum for the determination of the applicant's rights and obligations does not automatically engage its responsibility under Article 1 of Protocol No. 1. While the State could be held responsible for losses caused by such determinations by its courts if their decisions amounted to arbitrary and disproportionate interference with possessions, this is not the case here. Referring to the above findings under Article 6 of the Convention, the Court notes that the interpretations of the domestic courts cannot be regarded as arbitrary or manifestly unreasonable. There is therefore no appearance of a violation of Article 1 of Protocol No. 1 to the Convention.

It follows that this part of the application is ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Michael O'BOYLE
Registrar

Elisabeth PALM
President