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

FOURTH SECTION

CASE OF EVAGOROU CHRISTOU v. TURKEY

(Application no. 18403/91)

JUDGMENT

STRASBOURG

27 January 2009

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 Evagorou Christou v. Turkey,

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

Nicolas Bratza, *President,*
Lech Garlicki,
Ljiljana Mijović,
David Thór Björgvinsson,
Ján Šikuta,
Päivi Hirvelä,
Işıl Karakaş, *judges,*
and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 6 January 2009,

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

PROCEDURE

1. The case originated in an application (no. 18403/91) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Cypriot national, Mrs Anna Evagorou Christou ("the applicant"), on 31 May 1991.

2. The applicant, who was granted legal aid, was represented by Mr A. Demetriades, a lawyer practising in Nicosia. The Turkish Government ("the Government") were represented by their Agent, Mr Z.M. Necatigil.

3. The applicant alleged that the Turkish occupation of the northern part of Cyprus had deprived her of her home and properties.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. By a decision of 24 August 1999 the Court declared the application admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). In addition, third-party comments were received from the Government of Cyprus, which had exercised its right to intervene (Article 36 § 1 of the Convention and Rule 44 § 1 (b)).

THE FACTS

7. The applicant was born in 1925 and lives in Nicosia.

8. The applicant lived with her family in Kalogrea, a village in the District of Kyrenia. During the 1974 intervention, the Turkish military troops evicted the applicant and her family from their home and forced them to leave Kyrenia and flee to the south.

9. The applicant alleged that until 7 September 1999, when the properties were transferred to her children, she had been the owner of ten plots of land in Kalogrea, two of which had one house each on them. One of these houses had been the applicant's home. It was an ancestral house built in 1916, comprising huge, spacious rooms, two bedrooms, a living room, a kitchen and a bathroom. It had two levels and a huge yard. It was built of stone, had marble floors and a titled roof, and wooden doors and windows. The second house was the applicant's holiday home, built in 1958 and situated in the locality known as Roukania. It had two spacious bedrooms and was very close to the sea (about 50 metres).

10. In support to her claim to ownership, the applicant produced affirmations of ownership issued by the Department of Lands and Surveys of the Republic of Cyprus, stating that she was the legal and registered owner of the two houses and of the pieces of lands registered under the plots nos. 260, 268, 45, 119/5, 119/6, 164.9, 121/2/3, 122/2/4, 359/1 and 425.

The applicant also produced certificates of registration for eight of the ten properties at issue.

11. The applicant claimed that she had been prevented from returning to her home and properties because the Turkish military authorities had continuously occupied and used them.

12. On 9 December 1990 the applicant made an attempt to return to her home and property in Kyrenia and in the Kalogrea Village by participating in a convoy of cars of fellow refugees intending to return home. The demonstration organisers had informed the Commander of the United Nations (UN) forces in Cyprus of their intentions.

13. The applicant and her fellow refugees stopped at the check point in the "buffer zone", on the main road linking Nicosia and Famagusta. There, they asked the UN officer on duty to be allowed to return to their homes, property and villages. They requested the same officer to forward their demand to the Turkish military authorities. The officer replied that the latter had refused their request.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

14. The Government raised preliminary objections of inadmissibility *ratione loci* and *ratione temporis*, non-exhaustion of domestic remedies and lack of victim status. The Court observes that these objections were identical to those raised in the case of *Alexandrou v. Turkey* (no. 16162/90, §§ 11-22, 20 January 2009), and should be dismissed for the same reasons.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

15. The applicant complained of a violation of her right to peaceful enjoyment of her possessions, since she was prevented from returning to and making use of his property in northern Cyprus.

She invoked 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."

16. The Government disputed this claim.

A. The arguments of the parties

1. The Government

17. The Government submitted that the applicant had produced no evidence that at the time of the 1974 Turkish intervention she had been the owner of plots of lands in the Kalogrea village. It followed that her claims under Article 1 of Protocol No. 1 were unsubstantiated. Moreover, the applicant had not applied through the proper channels to visit her alleged properties. She had not attempted to enter the northern part of Cyprus at an approved crossing point; the so-called attempt on 9 December 1990 had been a publicity ploy, instigated by the Greek-Cypriot administration.

18. Finally, the alleged interference with the applicant's property rights could not be seen in isolation from the general political situation on the island of Cyprus and had been in any event justified in the general interest.

2. The applicant

19. The applicant complained that since the Turkish invasion of the northern part of Cyprus in July 1974, Turkey had prevented her from exercising her right to the peaceful enjoyment of her home and possessions. She submitted, in particular, that on 9 December 1990 she had been prevented from returning to her home and property. The applicant observed that she had produced documentary evidence that she was the owner of the properties at issue. Relying on the principles laid down by the Court in the case of *Loizidou v. Turkey* ((merits), 18 December 1996, *Reports of Judgments and Decisions* 1996-VI), she alleged that the interference with her property rights had lacked any legal justification.

B. The third-party intervener's arguments

20. The Government of Cyprus observed that their Department of Lands and Surveys had provided certificates confirming ownership to those persons who did not have title deeds in their possession but whose title was entered in the District Land Offices registers in the Turkish-occupied area. These certificates were *prima facie* evidence of their right of property. The authorities of the "Turkish Republic of Northern Cyprus" (the "TRNC") were in possession of all the records of the Department of Lands and Surveys relating to the title to properties. It was therefore the duty of the respondent Government to produce them.

21. The Government of Cyprus further noted that the present case was similar to that of *Loizidou* ((merits) cited above), where the Court had found that the loss of control of property by displaced persons arose as a consequence of the occupation of the northern part of Cyprus by Turkish troops and the establishment of the "TRNC", and that the denial of access to property in occupied northern Cyprus constituted a continuing violation of Article 1 of Protocol No. 1.

C. The Court's assessment

22. The Court first notes that the documents submitted by the applicant (see paragraph 10 above) provide *prima facie* evidence that, until she transferred it to her children, she had a title of ownership over the properties at issue. As the respondent Government failed to produce convincing evidence in rebuttal, the Court considers that the applicant had a "possession" within the meaning of Article 1 of Protocol No. 1.

23. The Court recalls that in the aforementioned *Loizidou* case ((merits), cited above, §§ 63-64), it reasoned as follows:

> "63. ... as a consequence of the fact that the applicant has been refused access to the land since 1974, she has effectively lost all control over, as well as all possibilities to

use and enjoy, her property. The continuous denial of access must therefore be regarded as an interference with her rights under Article 1 of Protocol No. 1. Such an interference cannot, in the exceptional circumstances of the present case to which the applicant and the Cypriot Government have referred, be regarded as either a deprivation of property or a control of use within the meaning of the first and second paragraphs of Article 1 of Protocol No. 1. However, it clearly falls within the meaning of the first sentence of that provision as an interference with the peaceful enjoyment of possessions. In this respect the Court observes that hindrance can amount to a violation of the Convention just like a legal impediment.

64. Apart from a passing reference to the doctrine of necessity as a justification for the acts of the 'TRNC' and to the fact that property rights were the subject of intercommunal talks, the Turkish Government have not sought to make submissions justifying the above interference with the applicant's property rights which is imputable to Turkey.

It has not, however, been explained how the need to rehouse displaced Turkish Cypriot refugees in the years following the Turkish intervention in the island in 1974 could justify the complete negation of the applicant's property rights in the form of a total and continuous denial of access and a purported expropriation without compensation.

Nor can the fact that property rights were the subject of intercommunal talks involving both communities in Cyprus provide a justification for this situation under the Convention. In such circumstances, the Court concludes that there has been and continues to be a breach of Article 1 of Protocol No. 1."

24. In the case of *Cyprus v. Turkey* ([GC], no. 25781/94, ECHR 2001-IV) the Court confirmed the above conclusions (§§ 187 and 189):

"187. The Court is persuaded that both its reasoning and its conclusion in the Loizidou judgment (*merits*) apply with equal force to displaced Greek Cypriots who, like Mrs Loizidou, are unable to have access to their property in northern Cyprus by reason of the restrictions placed by the "TRNC" authorities on their physical access to that property. The continuing and total denial of access to their property is a clear interference with the right of the displaced Greek Cypriots to the peaceful enjoyment of possessions within the meaning of the first sentence of Article 1 of Protocol No. 1.

...

189. .. there has been a continuing violation of Article 1 of Protocol No. 1 by virtue of the fact that Greek-Cypriot owners of property in northern Cyprus are being denied access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights."

25. The Court sees no reason in the instant case to depart from the conclusions which it reached in the *Loizidou* and *Cyprus v. Turkey* cases (*op. cit.*; see also *Demades v. Turkey*, (merits), no. 16219/90, § 46, 31 July 2003).

26. Accordingly, it concludes that there has been a violation of Article 1 of Protocol No. 1 to the Convention by virtue of the fact that the applicant

has been denied access to and control, use and enjoyment of her property as well as any compensation for the interference with her property rights.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

27. The applicant submitted that in 1974 she had had her home in Kalogrea. As she had been unable to return there, she was the victim of a violation of Article 8 of the Convention.

This provision reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

28. The Government disputed this claim, observing that the applicant complaints were only in respect of "field plots" and not in respect of her "home". Moreover, she was no longer living in the area where she alleged she had had her "home". In any event, the applicant's inability to return to northern Cyprus had been an inevitable consequence of the political state of affairs on the island and of the existence of the UN buffer zone. The alleged interference with her rights under Article 8 had therefore been necessary in the interests of national security, public safety, for the prevention of disorder and for the protection of the rights and freedoms of others.

29. The applicant submitted that, contrary to the applicant in the *Loizidou* case, she had been the owner of a house in Kalogrea and that until 1974 she and her family had been using these premises as their home. She claimed that any interference with her Article 8 rights had not been justified under the second paragraph of this provision.

30. The Government of Cyprus submitted that where the applicant's properties constituted the person's home, there was a violation of Article 8 of the Convention.

31. The Court notes that the Government failed to produce any evidence capable of casting doubt upon the applicant's statement that, at the time of the Turkish intervention, she was regularly residing in Kalogrea and that this house was treated by the applicant and her family as a home.

32. Accordingly, the Court considers that in the circumstances of the present case, the house of the applicant qualified as "home" within the meaning of Article 8 of the Convention at the time when the acts complained of took place.

33. The Court observes that the present case differs from the *Loizidou* case ((merits), cited above) since, unlike Mrs Loizidou, the applicant actually had a home in Kalogrea.

34. The Court notes that since 1974 the applicant was unable to gain access to and to use that home. In this connection the Court recalls that, in its judgment in the case of *Cyprus v. Turkey* (cited above, §§ 172-175), it concluded that the complete denial of the right of Greek-Cypriot displaced persons to respect for their homes in northern Cyprus since 1974 constituted a continuing violation of Article 8 of the Convention. The Court reasoned as follows:

> "172. The Court observes that the official policy of the 'TRNC' authorities to deny the right of the displaced persons to return to their homes is reinforced by the very tight restrictions operated by the same authorities on visits to the north by Greek Cypriots living in the south. Accordingly, not only are displaced persons unable to apply to the authorities to reoccupy the homes which they left behind, they are physically prevented from even visiting them.
>
> 173. The Court further notes that the situation impugned by the applicant Government has obtained since the events of 1974 in northern Cyprus. It would appear that it has never been reflected in 'legislation' and is enforced as a matter of policy in furtherance of a bi-zonal arrangement designed, it is claimed, to minimise the risk of conflict which the intermingling of the Greek and Turkish-Cypriot communities in the north might engender. That bi-zonal arrangement is being pursued within the framework of the inter-communal talks sponsored by the United Nations Secretary-General ...
>
> 174. The Court would make the following observations in this connection: firstly, the complete denial of the right of displaced persons to respect for their homes has no basis in law within the meaning of Article 8 § 2 of the Convention (see paragraph 173 above); secondly, the inter-communal talks cannot be invoked in order to legitimate a violation of the Convention; thirdly, the violation at issue has endured as a matter of policy since 1974 and must be considered continuing.
>
> 175. In view of these considerations, the Court concludes that there has been a continuing violation of Article 8 of the Convention by reason of the refusal to allow the return of any Greek-Cypriot displaced persons to their homes in northern Cyprus."

35. The Court sees no reason in the instant case to depart from the above reasoning and findings (see also *Demades* (merits), cited above, §§ 36-37).

36. Accordingly, it concludes that there has been a continuing violation of Article 8 of the Convention on account of the complete denial of the applicant's right to respect for her home.

IV. ALLEGED VIOLATION OF ARTICLE 1 OF THE CONVENTION AND OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1

37. The applicant complained of a violation of the general obligation to respect human rights enshrined in Article 1 of the Convention. She also complained of a violation under Article 14 of the Convention on account of discriminatory treatment against her in the enjoyment of her rights under Article 8 of the Convention and Article 1 of Protocol No. 1. She alleged that this discrimination had been based on her national origin and religious beliefs.

The relevant provisions read as follows:

Article 1 of the Convention

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

Article 14 of the Convention

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

38. The Government disputed these claims.

39. The Court recalls that in the above-mentioned *Alexandrou* case (cited above, §§ 38-39) it has found that it was not necessary to carry out a separate examination of the complaint under Article 14 of the Convention. The Court does not see any reason to depart from that approach in the present case (see also, *mutatis mutandis*, *Eugenia Michaelidou Ltd and Michael Tymvios v. Turkey*, no. 16163/90, §§ 37-38, 31 July 2003). Moreover, the Court has found the respondent Government to be in breach of Article 1 of Protocol No. 1 and of Article 8 of the Convention and does not consider it necessary to examine the complaint under Article 1, which is a framework provision that cannot be breached on its own (see *Ireland v. the United Kingdom*, § 238, 18 January 1978, Series A no. 25, and *Eugenia Michaelidou Ltd and Michael Tymvios*, cited above, § 42).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. 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. Pecuniary and non-pecuniary damage

1. The parties' submissions

(a) The applicant

41. In her just satisfaction claims of 19 November 1999, the applicant requested 236,004 Cypriot pounds (CYP – approximately 403,236 euros (EUR)) for pecuniary damage. She relied on an expert's report assessing the value of her losses which included the loss of annual rent collected or expected to be collected from renting out her plots of lands and her houses in Kalogrea and Roukania, plus interest from the date on which such rents were due until the day of payment. The rent claimed was for the period dating back to January 1987, when the respondent Government accepted the right of individual petition, until January 2000. The applicant did not claim compensation for any purported expropriation since she was still the legal owner of the properties. The valuation report contained a description of Kalogrea village and of the applicant's properties.

42. The valuation report calculated the annual rent obtainable from the applicant's properties as a percentage (ranging from 4 to 6 percent) of their market value in 1974. In particular, the house where the applicant had permanently resided had a value of CYP 7,928 (approximately EUR 13,545), while her summer place was worth CYP 6,924 (approximately EUR 11,830). In 1974, the annual rent was CYP 317 (approximately EUR 541) for the first house and CYP 277 (approximately EUR 473) for the second one. The total rent obtainable in 1974 from the applicant's fields was estimated at CYP 1,324 (approximately EUR 2,262). The expert further took into account the trends in rent increase (an average of 5% per annum). Moreover, compound interest for delayed payment was applied at a rate of 8% per annum.

43. On 24 January 2008, following a request from the Court for an update on developments in the case, the applicant submitted updated claims for just satisfaction, which were meant to cover the period of loss of use of the property from 1 January 1987 to 31 December 2007. She produced a revised valuation report which, on the basis of the criteria adopted in the

previous report, concluded that the whole sum due for the loss of use was CYP 394,254 plus CYP 346,113 for interest. The total sum claimed under this head was thus CYP 740,368 (approximately EUR 1,264,993).

44. In her just satisfaction claims of 19 November 1999, the applicant further claimed CYP 180,000 (approximately EUR 307,548) in respect of non-pecuniary damage. In particular, she claimed CYP 30,000 for the anguish and frustration suffered on account of the continuing violation of her property rights. She stated that this sum had been calculated on the basis of the sum awarded by the Court in the *Loizidou* case ((just satisfaction), 28 July 1998, *Reports* 1998-IV), taking into account, however, that the period of time for which the damage was claimed in the instant case was longer. Further the applicant claimed CYP 90,000 for the distress and suffering she had been subjected to due to the denial of her home. She considered this to be more serious than the violation of her property rights. She also requested CYP 60,000 for the violation of her rights under Article 14 of the Convention.

45. Finally, in her updated claims for just satisfaction of 24 January 2008, the applicant requested an additional EUR 50,000 for non-pecuniary damage.

(b) The Government

46. The Government filed comments on the applicant's updated claims for just satisfaction on 30 June 2008 and 15 October 2008. They pointed out that the present application was part of a cluster of similar cases raising a number of problematic issues and maintained that the claims for just satisfaction were not ready for examination. The Government had in fact encountered serious problems in identifying the properties and their present owners. The information provided by the applicants in this regard was not based on reliable evidence. As concerns specifically the present application, the Government noted that in the application form were listed two separate plots of land described as “fields”. However, in her just satisfaction claims of November 1999 the applicant had listed ten plots of land. Moreover, owing to the lapse of time since the lodging of the applications, new situations might have arisen: the properties could have been transferred, donated or inherited within the legal system of southern Cyprus. These facts would not have been known to the respondent Government and could be certified only by the Greek Cypriot authorities, who, since 1974, had reconstructed the registers and records of all properties in northern Cyprus. Applicants should be required to provide search certificates issued by the Department of Lands and Surveys of the Republic of Cyprus. Moreover, in cases where the original applicant had passed away or the property had changed hands, questions might arise as to whether the new owners had a legal interest in the property and whether they were entitled to pecuniary and/or non-pecuniary damages.

47. The Government further noted that some applicants had shared properties and that it had not been proved that their co-owners had agreed to the partition of the possessions. Nor, when claiming damages based on the assumption that the properties had been rented after 1974, had the applicants shown that the rights of the said co-owners under domestic law had been respected.

48. The Government further submitted that as an annual increase of the value of the properties had been applied, it would be unfair to add compound interest for delayed payment, and that Turkey had recognised the jurisdiction of the Court on 21 January 1990, and not in January 1987. In any event, the alleged 1974 market value of the properties was exorbitant, highly excessive and speculative; it was not based on any real data with which to make a comparison and made insufficient allowance for the volatility of the property market and its susceptibility to influences both domestic and international. The report submitted by the applicant had instead proceeded on the assumption that the property market would have continued to flourish with sustained growth during the whole period under consideration.

49. The Government produced a valuation report prepared by the Turkish-Cypriot authorities, which they considered to be based on a "realistic assessment of the 1974 market values, having regard to the relevant land records and comparative sales in the areas where the properties [were] situated". This report contained two proposals, assessing, respectively, the sum due for the loss of use of the properties and their present value. The second proposal was made in order to give the applicant the option to sell the properties to the State, thereby relinquishing title to and claims in respect of them.

50. The report prepared by the Turkish-Cypriot authorities specified that it would be possible to envisage, either immediately or after the resolution of the Cyprus problem, restitution of the pieces of lands registered under the plots no. 260, 268, 119/5, 119/6, 359/1 and 425 (see paragraph 10 above). The other immovable properties referred to in the application were possessed by refugees; they could not form the object of restitution but could give entitlement to financial compensation, to be calculated on the basis of the loss of income (by applying a 5% rent on the 1974 market values) and increase in value of the properties between 1974 and 7 September 1999 (date on which the applicant transferred her properties to her children – see paragraph 9 above). Had the applicant applied to the Immovable Property Commission, the latter would have offered CYP 98,377.12 (approximately EUR 168,087) to compensate the loss of use and CYP 238,849.23 (approximately EUR 408,097) for the value of the properties. According to an expert appointed by the "TRNC" authorities, the 1974 open-market value of the applicant's properties was CYP 10,225 (approximately 17,470 EUR). Upon fulfilment of certain conditions, the

Immovable Property Commission could also have offered the applicant exchange of her properties with Turkish-Cypriot properties located in the south of the island.

51. Finally, the Government did not comment on the applicant's submissions under the head of non-pecuniary damage.

2. The third-party intervener

52. The Government of Cyprus fully supported the applicant's updated claims for just satisfaction.

3. The Court's assessment

53. The Court first notes that the Government's submission that doubts might arise as to the applicant's title of ownership over the properties at issue (see paragraph 46 above) is, in substance, an objection of incompatibility *ratione materiae* with the provisions of Article 1 of Protocol No. 1. Such an objection should have been raised before the application was declared admissible or, at the latest, in the context of the parties' observations on the merits. In any event, the Court cannot but confirm its findings that the applicant had a "possession" over the properties at issue within the meaning of Article 1 of Protocol No. 1 (see paragraph 22 above).

54. In the circumstances of the case, the Court considers that the question of the application of Article 41 in respect of pecuniary and non-pecuniary damage is not ready for decision. It observes, in particular, that the parties have failed to provide reliable and objective data pertaining to the prices of land and real estate in Cyprus at the date of the Turkish intervention. This failure renders it difficult for the Court to assess whether the estimate furnished by the applicant of the 1974 market value of her properties is reasonable. The question must accordingly be reserved and the subsequent procedure fixed with due regard to any agreement which might be reached between the respondent Government and the applicant (Rule 75 § 1 of the Rules of Court).

B. Costs and expenses

55. In her just satisfaction claims of 19 November 1999, relying on bills from her representative, the applicant sought CYP 3,207 (approximately EUR 5,480) for the costs and expenses incurred in the proceedings before the Court. This sum included CYP 900 (approximately EUR 1,537) for the cost of the expert report assessing the value of her properties. In her written observations of 15 January 2004 the applicant claimed additional legal fees for CYP 2,645 (approximately EUR 4,519). In her updated claims for just satisfaction of 24 January 2008 she submitted additional bills of costs for the new valuation report and for legal fees amounting to EUR 1,955 and

EUR 2,955.5 respectively. The total sum sought for cost and expenses was thus approximately EUR 14,910.

56. The Government did not comment on this point.

57. In the circumstances of the case, the Court considers that the question of the application of Article 41 in respect of costs and expenses is not ready for decision. The question must accordingly be reserved and the subsequent procedure fixed with due regard to any agreement which might be reached between the respondent Government and the applicant.

FOR THESE REASONS, THE COURT

1. *Dismisses* by six votes to one the Government's preliminary objections;

2. *Holds* by six votes to one that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

3. *Holds* by six votes to one that there has been a violation of Article 8 of the Convention;

4. *Holds* unanimously that it is not necessary to examine whether there has been a violation of Articles 1 and 14 of the Convention;

5. *Holds* unanimously that the question of the application of Article 41 is not ready for decision;
   accordingly,
   (a) *reserves* the said question in whole;
   (b) *invites* the Government and the applicant to submit, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
   (c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 27 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı Deputy Registrar	Nicolas Bratza President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Karakaş is annexed to this judgment.

N.B.
F.A.

DISSENTING OPINION OF JUDGE KARAKAŞ

(Translation)

Unlike the majority, I consider that the objection of non-exhaustion of domestic remedies raised by the Government should not have been rejected. Consequently, I cannot agree with the finding of violations of Article 1 of Protocol No. 1 and of Article 8 of the Convention.

The rule of exhaustion of domestic remedies is intended to give Contracting States the opportunity to prevent or provide redress for violations alleged against them before such allegations are referred to the Court. That reflects the subsidiary nature of the Convention system.

Faced with the scale of the problem of deprivations of title to property alleged by Greek Cypriots (approximately 1,400 applications of this type lodged against Turkey), the Court, in the operative part of its *Xenides-Arestis v. Turkey* judgment of 22 December 2005, required the respondent State to provide a remedy guaranteeing the effective protection of the rights set forth in Article 8 of the Convention and Article 1 of Protocol No. 1 in the context of all the similar cases pending before it. The State has a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41 of the Convention, but also to select the general or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. The Government submitted that by enacting the Law on Compensation for Immovable Properties (Law no. 67/2005) and setting up a Commission to deal with compensation claims it had discharged that obligation (see also *Xenides-Arestis v. Turkey* (just satisfaction), no. 46347/99, § 37, 7 December 2006). It is that domestic remedy which, in their submission, the applicant failed to exercise in the present case.

The exhaustion of domestic remedies is **normally** assessed at the time when an application is lodged with the Court. However, there are exceptions to the rule which may be justified by **the particular circumstances of each case** (see *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V (extracts)).

Examples of such exceptions are to be found in the cases against Italy which raised similar questions and in which the Court found that certain specific facts justified **departing from the general principle** (see *Brusco v. Italy*, (dec.) no. 69789/01, ECHR 2001-IX).

In other examples the Court also took the view, in the light of the specific facts of the cases concerned, and having regard to the subsidiary nature of the Convention mechanism, that new domestic remedies had not been exhausted (see the following decisions: *Nogolica v. Croatia*, no. 77784/01, ECHR 2002-VIII; *Slaviček v. Croatia*, no. 20862/02, ECHR 2002-VII;

Andrášik and Others v. Slovakia, nos. 57984/00, 60226/00, 60242/00, 60679/00, 60680/00 and 68563/01, ECHR 2002-IX; and *Içyer v. Turkey*, no. 18888/02, ECHR 2006-I).

In situations where there is no effective remedy affording the opportunity to complain of alleged violations, individuals are systematically compelled to submit to the European Court of Human Rights applications which could have been investigated first of all within the domestic legal order. In that way, the functioning of the Convention system risks losing its effectiveness in the long term (the most pertinent example is the *Broniowski v. Poland* case ([GC], no. 31443/96, ECHR 2004-V).

In my opinion the above examples provide an opportunity to review the conditions for admissibility in the event of a major change in the circumstances of the case. For the similar post-*Loizidou* cases, the Court can always reconsider its admissibility decision and examine the preliminary objection of failure to exhaust domestic remedies.

Since the Court may reject "**at any stage of the proceedings**" (Article 35 § 4 of the Convention) an application which it considers inadmissible, new facts brought to its attention may lead it, even when examining the case on the merits, to reconsider the decision in which the application was declared admissible and ultimately declare it inadmissible pursuant to Article 35 § 4 of the Convention, taking due account of the context (see, for example, *Medeanu v. Romania* (dec.), no. 29958/96, 8 April 2003, and *Azinas v. Cyprus* [GC], no. 56679/00, §§ 37-43, ECHR 2004-III).

The existence of a "**new fact**" which has come to light after the admissibility decision may prompt the Court to reconsider that decision.

I consider that the Law on Compensation for Immovable Properties (Law no. 67/2005) and the Commission set up to deal with compensation claims, which are based on the guiding principles laid down by the Court in the *Xenides-Arestis* case, are capable of providing an opportunity for the State authorities to provide redress for breaches of the Convention's provisions, including breaches alleged in applications already lodged with the Court before the Act's entry into force (see *Içyer*, cited above, § 72). That consideration also applies to applications already declared admissible by the Court (see *Azinas*, cited above).

In order to conclude whether there has or has not been a breach of the Convention, complainants must first exercise the new domestic remedy and then, if necessary, lodge an application with the European Court of Human Rights, the international court. Following that logic, I cannot in this case find any violation of the Convention's provisions.