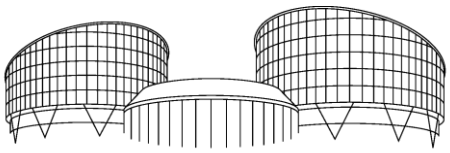

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF FOKAS v. TURKEY

(Application no. 31206/02)

JUDGMENT
(*Just satisfaction*)

STRASBOURG

1 October 2013

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 Fokas v. Turkey,

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

Guido Raimondi, *President,*
Danutė Jočienė,
Peer Lorenzen,
Dragoljub Popović,
Işıl Karakaş,
Nebojša Vučinić,
Paulo Pinto de Albuquerque, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 10 September 2013,

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

PROCEDURE

1. The case originated in an application (no. 31206/02) 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 two Greek nationals, Mr Ioannis Fokas and Mr Evangelos Fokas ("the applicants"), on 6 March 2002.

2. In a judgment delivered on 29 September 2009 ("the principal judgment"), the Court held that there had been a violation of the applicants' right to peaceful enjoyment of their possessions under Article 1 of Protocol No. 1 to the Convention (see *Fokas v. Turkey*, no. 31206/02, § 45, 29 September 2009).

3. Under Article 41 of the Convention the applicants sought just satisfaction for the damage that they had sustained as a result of the Turkish courts' refusal to recognise their status as heirs of the late Polikseni Pistika in respect of immovable property in Istanbul.

4. Since the question of the application of Article 41 of the Convention was not ready for decision, the Court reserved judgment on it and invited the Government and the applicants to submit, within three months, their written observations on that issue and, in particular, to notify the Court of any agreement they might reach (see *ibid.*, p. 11, § 55, and point 4 of the operative provisions).

5. The applicants and the Government each duly submitted observations.

THE LAW

6. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

1. The parties' submissions

(a) The applicants

7. The applicants submitted that they had been deprived of the ownership and use of three immovable properties in the Beyoğlu district of Istanbul, namely three buildings and land, which they were entitled to inherit from their sister.

8. The applicants requested the restitution of all three properties, given that they had been unlawfully expropriated. They maintained that restitution should be available because currently the first property belonged to the respondent Government; the second property could be expropriated and returned to them; and the third property was already for sale and therefore the Government could purchase it and return it to them.

9. In the event that the Court decided that restitution was impossible, which the applicants would challenge, then in addition to compensation for loss of use, the current market value of the three properties should be paid to the applicants.

10. In this connection, based on a valuation report prepared by an Istanbul property company, the applicants estimated the value of the three properties at:

- 3,334,127 euros (EUR) for the first property, an eight-storey brick building on a plot measuring 421 square metres, being used by the Rotary Children's Club for the rehabilitation of street children;
- EUR 1,428,911 for the second property, a six-storey brick apartment building on a plot measuring 110 square metres, the ground floor of which was being used as a restaurant and the remaining floors as residential flats; and
- EUR 404,858 for the third property, a four-storey brick building on a plot measuring 104 square metres; the basement and ground floor were being used as a café and the remaining three floors as a residential flat or office.

11. The applicants noted that the aforementioned amounts were the minimum, since data taken from the website of the Beyoğlu Municipality showed that there had been a huge increase in prices in 2009. This was

corroborated by a report compiled by the Greek Consulate General in Istanbul.

12. The applicants further claimed EUR 15,825,265 for loss of use of the three properties from 1987 to November 2012. The valuation report prepared by the Istanbul property company stated that the first building would have earned the applicants EUR 8,053,417 in rent, together with interest; the second building would have earned them EUR 5,155,594 in rent together with interest; and the third building would have earned them EUR 1,433,150 in rent together with interest.

13. Lastly, the applicants each claimed EUR 100,000 in non-pecuniary damages for the stress and distress which they had suffered. In this connection, they maintained that the Government must be held accountable for their insensitivity and their religious and ethnic discrimination.

(b) The Government

14. The Government submitted that the amounts claimed by the applicants were speculative and unsubstantiated.

15. The Government noted that the *restitutio in integrum* of the properties was impossible in the circumstances of the present case. As regards the characteristics of the buildings, they explained that these were three brick buildings constructed on plots measuring 421, 110 and 104 square metres in the Tepebaşı and Taksim neighbourhoods of Istanbul. In order to estimate the value of the properties, the Government obtained valuation reports prepared by two different authorities, namely a local property company and the National Estate Supervisors Office attached to the Istanbul Governorship.

16. The first authority inquired into the market value of the buildings in question and estimated them at 1,850,000 Turkish liras (TRL) (approximately EUR 790,000) for the first building, TRL 235,000 (approximately EUR 100,000) for the second building and TRL 475,000 (approximately EUR 200,000) for the third building.

17. The second authority estimated the first building's value at TRL 2,082,230 (approximately EUR 885,000), the second at TRL 1,488,217.50 (approximately EUR 635,000) and the third at TRL 270,585.10 (approximately EUR 115,000).

18. Accordingly, the Government concluded that the amounts claimed by the applicants for the value of the buildings were excessive.

19. As regards the applicants' claims concerning the loss of use of the properties, the Government maintained that they were based on fictitious calculations and were not justified.

20. Lastly, as regards the applicants' claims in respect of non-pecuniary damage, the Government submitted that the amounts claimed were excessive and that the finding of a violation in the present case constituted in itself adequate just satisfaction.

2. The Court's assessment

21. The Court reiterates that a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore, as far as possible, the situation existing before the breach (see *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 19, ECHR 2001-I).

22. The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under Article 1 of the Convention to secure the rights and freedoms guaranteed. If the nature of the breach allows *restitutio in integrum*, it is for the respondent State to implement it. If, however, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate (see *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 34, Series A no. 330-B).

23. The Court notes that this is a case of succession which concerned the national authorities' denial of the applicants' status as heirs of the late Polikseni Pistika, who had been deprived of the properties in question in 1998 and died thereafter in 2000 (see §§ 12-14 of the principal judgment). In the principal judgment, the Court found that the national courts' refusal to recognise the applicants' status as heirs constituted an interference with their right to peaceful enjoyment of their possessions and that such interference was incompatible with the principle of lawfulness and therefore contravened Article 1 of Protocol No. 1 (see §§ 43-44 of the principal judgment).

24. Accordingly, recognition of the applicants as the heirs of Polikseni Pistika – and therefore registration of their titles with their shares in the Land Registry office's log book for the properties in question – would place them in the position they would have been in, had the State not expropriated the deceased's property in breach of Article 1 of Protocol No. 1. However, it appears that the Government are unable to return the buildings and land to the applicants. In those circumstances, an award of compensation for the pecuniary loss seems to be the most appropriate just satisfaction for the applicants (see *Nacaryan and Deryan v. Turkey*, nos. 19558/02 and 27904/02, §§ 16-17, 8 January 2008). The Court considers that such an award principally corresponds to the amount that the applicants could legitimately expect to have obtained as compensation for the loss of their property, had there been a mechanism to request such compensation.

25. As to the determination of the amount of compensation, the Court notes that the parties submitted expert reports on the value of the properties in question. Having examined those reports, the Court observes that there is

a considerable divergence between the estimated values submitted by the parties' experts. Bearing in mind that none of the expert valuation reports was obtained through an adversarial judicial process, the Court does not consider itself bound by them (see, *mutatis mutandis*, *Kozacıoğlu v. Turkey* [GC], no. 2334/03, § 85, 19 February 2009).

26. As to the applicants' claims for the loss of use of the properties, the Court notes that the figures in the valuation report submitted by the applicants are based only on the lost opportunity to develop or lease the three buildings since 1987, the year in which Polikseni Pistika inherited them from her adoptive family (see paragraph 12 above). The property company thus estimated that since 1987 the buildings could have earned the applicants EUR 15,825,265 in rent.

27. However, the Court notes that its finding of a violation of Article 1 of Protocol No. 1 was based on the fact that, as a consequence of being denied the status of heirs, the applicants effectively lost all control over the properties, as well as any chance of using and enjoying them (see the principal judgment, §§ 43-44). Accordingly, the applicants are entitled to a measure of compensation in respect of the losses related to this violation of their rights as from the date of Polikseni Pistika's death, namely 24 April 2000, until the present time.

28. The Government limited their submissions to contesting the applicants' right to compensation for loss of use of the three properties and did not seek to challenge the approach to the calculation of the loss in question. Nevertheless, the Court does not simply accept without question the estimates provided by the applicants.

29. The Court observes that the assessment of the loss submitted by the applicants involves a significant degree of speculation and assumption. In particular, it presupposes that the applicants could have constantly rented the properties without any problem, and assumes that average market prices would have risen constantly since 1987.

30. As regards the applicants' claim in respect of non-pecuniary damage, the Court is of the opinion that an award should also be made in respect of the anguish and frustration which the applicants must have experienced over the years in not being able to use their properties.

31. In view of the above considerations and taking into account various factors liable to reduce or increase the estimated compensation as well as the uncertainties inherent in any attempt to quantify the real losses incurred by the applicants, the Court considers that it is reasonable and equitable to award the applicants the total sum of EUR 5,000,000 for pecuniary and non-pecuniary damage, together with any tax that may be chargeable on this amount.

B. Costs and expenses

32. As regards costs and expenses, the applicants claimed a total of EUR 61,063, including value-added tax. They contended that owing to the seriousness and unprecedented nature of the case, the services of a Turkish lawyer and specialised Greek and Cypriot counsels were required for the proceedings before the domestic courts and the Strasbourg Court. The fees of the Cypriot lawyer amounted to EUR 13,911.43. The Turkish and Greek lawyers' fees totalled EUR 30,333. In order to prepare this just satisfaction claim, an additional amount of EUR 16,818.75 was incurred for the fees of three Cypriot lawyers. Lastly, EUR 3,000 was incurred for three valuation reports in respect of the three properties.

33. The Government submitted that the amounts claimed were unsubstantiated and excessive.

34. 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 are reasonable as to quantum.

35. In the present case, the applicants submitted invoices indicating the time spent for the preparation and submission of their application by Turkish, Greek and Cypriot counsels and the costs incurred by them for the preparation of their just satisfaction claims.

36. The Court observes that the case involved perusing a certain amount of factual and documentary evidence and required a fair degree of research and preparation. In particular, the costs associated with producing valuation reports in view of the continuing nature of the violation at stake were essential to enable the Court to reach a decision regarding the issue of just satisfaction.

37. Although the Court does not doubt that part of the amounts claimed for the costs and expenses relating to the proceedings before it was actually and necessarily incurred, it considers that the applicants' claims for their representation before the Court are excessive. In particular, the Court is not convinced about the need to instruct counsels from three different countries and the amount of fees claimed by those counsels. It thus decides to award a total sum of EUR 15,000.

C. Default interest

38. 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. *Holds*

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be paid at the rate applicable at the date of settlement:

(i) EUR 5,000,000 (five million euros), plus any tax that may be chargeable, in respect of pecuniary and non-pecuniary damage;

(ii) EUR 15,000 (fifteen thousand euros), plus any tax chargeable to the applicants, in respect of costs and expenses;

(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;

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

Done in English, and notified in writing on 1 October 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Guido Raimondi
Registrar	President