FOURTH SECTION

CASE OF [redacted] LTD v. TURKEY

(Application no. 46159/99)

JUDGMENT
(merits)

STRASBOURG

22 September 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 [redacted] Ltd 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 1 September 2009,

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

PROCEDURE

1. The case originated in an application (no. 46159/99) 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 company incorporated under Cypriot law, [redacted] Ltd ("the applicant"), on 25 January 1999.

2. The applicant 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 it of its 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 28 May 2002 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 company, whose headquarters were in Kyrenia (northern Cyprus), is owned by Mr [redacted], a Greek-Cypriot, Mrs [redacted], a British national of Greek-Cypriot origin, and Mrs [redacted], a German national of Greek-Cypriot origin. Its directors are Mr [redacted] and Mrs [redacted], an American citizen of Greek-Cypriot origin.

8. In 1972 the applicant company acquired a five storey 3-star hotel called the '[redacted]', located in Conon street in Kyrenia, and the plot of land on which the hotel was

built. The latter consisted of 56 rooms (each one with a private bath or shower and veranda) and 116 beds. Twenty of these rooms had been created following an expansion programme completed by late 1973. The hotel was situated on a seaside plot (plot no. 192, sheet/plan 12/12, block D, land area 1,989 m²) at a short distance west of Kyrenia harbour. The plot had a rectangular shape, flat surface at sea level, with a frontage of 60 metres on Conon street and 30 metres on the sea. The hotel was fully air conditioned and centrally heated and had a number of facilities (reception area, cafeteria, open-air restaurant, outdoor swimming pool, garden). The applicant company alleged that the hotel was operating at an annual profit of about 66,400 Cypriot pounds (CYP – approximately 113,451 euros (EUR)).

9. In support of its claim to ownership, the applicant company produced a certificate of affirmation of property (registration no. 3-506934) issued on 23 December 1992 by the Republic of Cyprus.

10. In July 1974, as the Turkish troops were advancing, the shareholders of the applicant company, the members of its board of directors and most of the hotel's guests were evacuated from Kyrenia by a British helicopter-carrier. Since then the shareholders of the applicant company had been prevented from having access to and enjoying their property. According to information available to them, after July 1974 the hotel had been used by the Turkish armed forces.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

11. The Government raised preliminary objections of inadmissibility for non-exhaustion of domestic remedies and lack of victim status. The Court observes that these objections are 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

12. The applicant company complained since July 1974, Turkey had prevented its managers and shareholders from exercising their right to the peaceful enjoyment of their possessions.

It 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."

13. The Government disputed this claim.

14. The applicant company relied, essentially, on the principles laid down by the Court in the cases of *Loizidou v. Turkey* ((merits), *Reports of Judgments and Decisions* 1996-VI, 18 December 1996) and *Cyprus v. Turkey* ([GC], no. 25781/94, ECHR 2001–IV).

15. The Government of Cyprus observed that the respondent Government did not contest the applicant company's claim to ownership. It further noted that the present case was similar to that of *Loizidou v. Turkey* ((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 "Turkish Republic of Northern Cyprus" (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.

16. The Court first notes that the document submitted by the applicant (see paragraph 9 above) provide *prima facie* evidence that it 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.

17. 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."

18. In the case of *Cyprus v. Turkey* (cited above) 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."

19. 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).

20. 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 was denied access to and control, use and enjoyment of its properties as well as any compensation for the interference with its property rights.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION, TAKEN IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL NO. 1

21. The applicant company complained of a violation under Article 14 of the Convention on account of discriminatory treatment against it in the enjoyment of its rights under Article 1 of Protocol No. 1. It alleged that this discrimination had been based on the national origin and/or religious beliefs of its managers and shareholders.

Article 14 of the Convention reads as follows:

"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."

22. The Court recalls that in the *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).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

23. 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

24. In its just satisfaction claims of 31 July 2002, the applicant requested CYP 1,686,014 (approximately EUR 2,880,723) for pecuniary damage. It relied on an expert's report assessing the value of its losses which included the loss of annual rent collected or expected to be collected from renting out the property, 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 1990 until 1 January 2003. The applicant did not claim compensation for any purported expropriation since it was still the legal owner of the property. The evaluation report contained a description of the [redacted] hotel (see paragraph 8 above) and of the town of Kyrenia, which, according to the applicant, in 1974 was one of the most popular tourist resorts of Cyprus. The demand for hotel accommodation in Kyrenia was high and good hotels were achieving high occupancy rates.

25. The starting point of the valuation report was the income receivable in July 1974. Having regard to the attractiveness of the hotel and to the profits made by other similar hotels in Cyprus, the [redacted] could have obtained CYP 35 (approximately EUR 59) per room per month. Taking into account that the hotel had 56 rooms and after the deduction of a percentage of 10% for possible outgoings, the 1974 annual rental value was estimated at CYP 21,168 (approximately EUR 36,167). This sum was subsequently adjusted to 1990 values by taking into account:

(a) the nature of the area were the property was situated;

(b) the trends of rents for the period 1970 – 1974 in similar areas;

(c) the trends of rents for the period after 1974 in the unoccupied areas of Cyprus (based on the Consumer Price Index 1960 – 2002 for Rents and Housing issued by the Department of Statistics and Research of the Government of Cyprus, increased by a percentage of 25%).

26. Finally, compound interest for delayed payment was applied at a rate of 8% per annum up to the end of 2000 and of 6% per annum for the years 2001 – 2002 (the total interest claimed amounted to CYP 643,567 – approximately EUR 1,099,598).

27. On 23 January 2008, following a request from the Court for an update on the developments of the case, the applicant submitted updated claims for just satisfaction, which were meant to cover the loss of the use of the property from 1 January 1987 to 31 December 2007. It 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 1,775,803, plus CYP 1,795,483 for interest. The total sum claimed under this head was thus CYP 3,571,287 (approximately EUR 6,101,900). The applicant also requested the additional amount of EUR 17,000 per month, to be adjusted in accordance with inflation for a period of 18 years or until the date on which the Turkish army will leave its possession vacant.

28. In its just satisfaction claims of 31 July 2002, the applicant further claimed CYP 873,000 (approximately EUR 1,491,607) in respect of non-pecuniary damage. In particular, it claimed CYP 30,000 (approximately EUR 51,258) for the anguish and frustration suffered on account of the continuing violation of its property rights. It stated that this sum had been calculated on the basis of the sum awarded by the Court in the *Loizidou* case ((just satisfaction), *Reports* 1998-IV, 28 July 1998), taking into account, however, that the period of time for which the damage was claimed in the instant case was longer. The applicant also claimed CYP 843,000 (approximately EUR 1,440,349) for the violation of its rights under Article 14 of the Convention, which was aggravated by the fact that the Turkish army was using the hotel for its own purposes.

29. Finally, in its updated claims for just satisfaction of 23 January 2008, the applicant requested the additional sum of EUR 50,000 for non-pecuniary damage.

(b) The Government

30. 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. 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. 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.

31. The Government further noted that some applicants had shared properties and that it was not 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.

32. The Government 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.

33. 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 property to the State, thereby relinquishing title to and claims in respect of it.

34. 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 property described in paragraph 8 above. In case the conditions for restitution were not fulfilled, the applicant could claim 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 property between 1974 and the date of payment. Had the applicant applied to the Immovable Property Commission, the latter would have

offered CYP 292,145.54 (approximately EUR 499,159) to compensate the loss of use and CYP 311,174.61 (approximately EUR 531,672) for the value of the property. According to an expert appointed by the "TRNC" authorities, the 1974 open-market value of the applicant's property was CYP 50,847 (approximately EUR 86,877). Upon fulfilment of certain conditions, the Immovable Property Commission could also have offered the applicant exchange of its properties with Turkish-Cypriot properties located in the south of the island.

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

2. The third party intervener

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

3. The Court's assessment

37. 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 30 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 finding that the applicant had a "possession" over the properties in Kyrenia within the meaning of Article 1 of Protocol No. 1 (see paragraph 16 above).

38. 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 its 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

39. In its just satisfaction claims of 31 July 2002, relying on bills from its representative, the applicant company sought CYP 4,034.1 (approximately EUR 6,892) for the costs and expenses incurred before the Court. This sum included CYP 800 (approximately EUR 1,366) for the costs of the expert report assessing the value of its properties. On 15 January 2004, it claimed additional expenses amounting to CYP 2,645 (approximately EUR 4,519). Finally, in its updated claims for just satisfaction of 23 January 2008, the applicant company submitted additional bills of costs for the new valuation report and for legal fees amounting to EUR 392.15 and EUR 2,955.5 (including V.A.T.) respectively. It indicated that the overall sum claimed for cost and expenses was EUR 10,240.32 (including V.A.T.).

40. The Government did not comment on this point.

41. 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* unanimously that it is not necessary to examine whether there has been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1;

4. *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 22 September 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı Nicolas Bratza
Deputy Registrar President

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

N.B.
F.A.

DISSENTING OPINION OF JUDGE KARAKAŞ

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 a violation of Article 1 of Protocol No. 1 of the Convention, for the same reasons as those mentioned in my dissenting opinion in the case of *Alexandrou v. Turkey* (no. 16162/90, 20 January 2009).