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Meeting: 1318th meeting (June 2018) (DH)

Item reference: Action report (10/04/2018)

Communication from Turkey concerning the case of GEREKSAR v. Turkey (Application No. 34764/05)

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Réunion : 1318e réunion (juin 2018) (DH)

Référence du point : Bilan d'action

Communication de la Turquie concernant l'affaire GEREKSAR c. Turquie (requête n° 34764/05)
(anglais uniquement)

Ankara, April 2018

REVISED ACTION REPORT

***Gereksar and Others v. Turkey* (34764/05, 34786/05, 34800/05, 34811/05)**

Judgment of 1 February 2011, final on 1 May 2011

I. CASE DESCRIPTION

1. The case concerns the violation of the applicants' right to property on account of the construction of an airport in 1996 on the applicants` properties and failure of the domestic courts to establish the facts of the applicants' cases and provide sufficient reasoning (Article 1 of Protocol No. 1).

2. The case further concerns violations of the right to a fair trial on account of the excessive length of proceedings before the administrative courts (started in August 1997 and ended in March 2005) and the failure of the domestic administrative court to communicate the observations of the opposing party to the applicants (Article 6 § 1).

II. INDIVIDUAL MEASURES

3. The Turkish Government has taken measures to ensure that the violation at issue has ceased and that the applicant is redressed for its negative consequences.

II.a. Reopening of the proceedings

4. The Court noted that in principle the most appropriate means of redressing the violation of Article 1 of the Protocol No. 1 would be a new trial or a reopening of the proceedings. In this regard, the Court noted that section 53 (1) (i) of the Law on Administrative Procedures expressly provided that a judgment of the Court declaring a violation of the Convention or its Protocols constituted a specific reason for the reopening of a procedure. In the Court`s view it was up to the applicants to use this opportunity. However, they did not make such a request.

II.b. Just Satisfaction

5. The European Court awarded each applicant just satisfaction of EUR 7,800 in respect of the non-pecuniary damages and EUR 400 for cost and expenses. The just satisfaction amount was paid within the time-limit set by the Court. In addition, outstanding default interest has been put in a deposit account in order to be transferred to the applicants' account when the required documents are submitted.

6. Thus, the Turkish authorities have taken all individual measures and no other individual measures are required.

III. GENERAL MEASURES

7. The Turkish Government has taken a number of measures aiming at preventing similar violations. These measures include in particular legislative measures, development in case-law of the Supreme Administrative Court, individual application before the Constitutional Court, training and awareness raising activities, and measures on the publication and dissemination of the Court's judgment.

III.a. Lack of adversarial proceedings

8. Article 16 of the Law on Administrative Procedures (no. 2577) dated 6 January 1982 concerns the notification of documents to the parties in administrative cases. According to this provision the applicant`s plea, defendant`s response and their second submissions that they can make following the first exchange shall be notified to each other.

Case-law of the Supreme Administrative Court

9. Following the European Court's judgment, the Supreme Administrative Court held in many cases that submissions made by the parties must be notified to the opposing parties.

10. For example, the 13th Chamber of the Supreme Administrative Court considered the matter of notification of the significant documents concerning the subject matter of the dispute in its decision rendered on 2 April 2015 (docket no. 2015/656, decision no. 2015/1352). In this judgment the Supreme Administrative Court held that ensuring the

participation of the parties in the proceedings was a requirement of the principle of fair trial. In this respect, the notification of significant documents produced in the course of proceedings was obligatory. In court`s view, the significant documents were particularly those on which the judgment was based. Thus, the Supreme Administrative Court found that the notification of expert reports is a requirement in order to ensure that the parties to the case were duly informed and thus able to submit their observations concerning the merits of the case. The court underlined that the right to a fair trial in adversarial proceedings should be respected.

11**.** Likewise, on 13 January 2017 (docket no. 2011/3594), the 13th Chamber of the Supreme Administrative Court decided that the first instance court failed to notify the individual complainant's response to an interim decision and the documents and its annexes submitted by the respondent administration. For this reason, the Supreme Administrative Court prescribed their notification and set a deadline for submission of statements in response.

12. On 16 December 2016 (docket no. 2014/5994, decision no. 2016/6496), the 12th Chamber, while emphasizing the necessity of the notification of the information and documents submitted by the respondent administration, specified that the request of amendment of pleading made by the complainant must be taken into account. In addition to that the 7th Chamber in its decisions dated 9 November 2004 (docket no. 2003/1101, decision no. 2004/2808), 23 May 2006 (docket no. 2005/4459, decision no. 2006/1667), and 20 February 2007(docket no. 2006/1098, decision no. 2007/590), decided that it was inappropriate to decide without the notification of the defence pleading or the replication in other words without the file being completed.

13. Additionally, on 21 September 2012 (docket no. 2012/7799, decision no. 2012/5699), the appellate 15th Chamber quashed the first instance court`s judgment on the ground that the first instance court failed to notify a petition submitted to request revision of the decision.

14. In this regard, the 13th Chamber of the Supreme Administrative Court decided in its many decisions (dated 3 December 2010, docket no. 2009/4216, decision no. 2010/8219;

dated 2 April 2010, docket no. 2009/4038, decision no. 2010/2779; dated 3 December 2010, docket no. 2009/4034, decision no. 2010/8218 and dated 10 November 2010, docket no. 2008/14340, decision no. 2010/7879) that considering the Article 16 of the Law no. 2577 which regulates notification and response clearly and precisely, the decisions of first instance courts were inappropriate since they were given without completing the file properly.

15. As is seen, in the case of *Gereksar and Others*, the problem about the failure to notify a document submitted by the defendant administration, which is of significance in respect of the points of law, to the other party to the case has been resolved by the case-law of the Supreme Administrative Court. The authorities would like to point out that the case-law of the domestic courts were fully aligned with the European Court`s findings in this case.

16. Therefore, the above samples of the Supreme Administrative Court decisions are showing the implementation in line with the understanding of the ECtHR.

III.b. Excessive length of proceedings

17. As regards the issue of excessive length in administrative proceedings, the Turkish authorities would like to recall that the general measures were taken within the scope of the *Ormancı group of cases* (43647/68) (see Resolution CM/ResDH(2014)298, 11215th meeting (DH), 17 December 2014).

18. In this regard, the Government would like to underline that the general measures taken under *Ormancı* are also relevant to the case at hand as the case facts took place before its closure.

III.c. Right to peaceful enjoyment of property

19. The Court decided that the violation of the applicants' right to peaceful enjoyment of property stemmed from lack of reasoning in the domestic administrative court's decision when discarding the applicants' evidence (§ 60-62).

20. Article 24 of the Law no. 2577 provides that the judgments rendered by the administrative courts shall be duly reasoned and a detailed rationale on the legal basis of the decision has to be provided therein.

Case-law of the Supreme Administrative Court

21. In the case of *Gereksar and Others*, the violations stemmed from failure to notify an expert report to the applicants and the domestic court's insufficient reasoning when discarding the applicants' evidence.

22. The Supreme Administrative Court attaches great importance to the fact that all the arguments and facts set forth by the parties are thoroughly examined in the proceedings conducted by the first instance courts. Therefore, in the court`s view, obtaining an expert report usually is crucial to provide a fair trial. For instance, the 8th Chamber of the Supreme Administrative Court stated in its decision dated 15 March 2017 (docket no. 2016/507, decision no. 2017/1619) that the first instance court rendered a decision with incomplete review as only on the basis of the statements of administration, the information and documents in the case file. Therefore, in court`s view, the proceedings were not conducted lawfully as the first instance court failed to have an expert report. Similarly, in another judgment rendered in 2002, the Supreme Administrative Court quashed a first instance court`s judgment on account of the fact that this court settled the dispute on the basis of documents included in the case –file without having an expert report. (The decision of 11 th Chamber of the Supreme Administrative Court, docket no. 2001/4426, decision no. 2002/3383, dated 12 November 2002). Accordingly, there are many decisions rendered by the Supreme Administrative Court stating that a new expert report or a supplementary report were required in order to clarify the facts and subject matter of the case (for example, the decision of the 8th Chamber of the Supreme Administrative Court, docket no. 2015/8947, decision no. 2016/760, dated 9 February 2016; the decision of the 10th Chamber of the Supreme Administrative Court, docket no. 2016/6912, decision no. 2017/817, dated 15 February 2017).

23. As regards the issue of lack of sufficient reasoning, on many occasions, the Supreme Administrative Court quashed the first instance courts` judgments on account of lack of

sufficient reasoning. For example, the Supreme Administrative Court found in its decision rendered on 11 May 2005 (The decision of the 6th Chamber, docket no. 2003/4649, decision no. 2005/2708) that the first instance courts should provide sufficient reasoning in its annulment decisions. On this basis, the supreme court consistently quashes and remits the case-file to the first instance court (for example, the 6th Chamber, docket no. 2008/6462, decision no. 2009/5965, dated 21 May 2009, 8th Chamber of the Supreme Administrative Court, docket no. 2016/1668, decision no. 2016/8099, dated 31 October 2016; docket no. 2013/11243, decision no. 2016/5520, dated 24 May 2016; docket no. 2014/6408, decision no. 2016/4276, dated 26 April 2016; the decisions of the 10th Chamber of the Supreme Administrative Court, docket no. 2010/12962, decision no. 2015/189, dated 28 January 2015, docket no. 2010/15189, decision no. 2014/8102, dated 24 December 2014; the decisions of the 11th Chamber of the Supreme Administrative Court, docket no. 2003/826, decision no. 2006/1483, dated 27 March 2006; docket no. 2007/6274, decision no. 2009/8237, dated 12 October 2009; docket no. 2009/4774, decision no. 2013/3694, dated 15 April 2013; the decision of the 13th Chamber of the Supreme Administrative Court, docket no. 2016/861, decision no. 2016/3125, dated 5 October 2016). Therefore, notably following the European Court's judgment the Supreme Administrative Court developed a coherent practice closely examining whether the first instance courts` judgments are sufficiently reasoned.

24. To conclude, the Supreme Administrative Court aligned its case law with the European Court`s findings in this case.

III.d. Individual Application Right before the Constitutional Court

25. Although it is not a major response to the European Court's judgment in this case, the authorities would furthermore like to highlight that a person in the applicant's situation has at his or her disposal today an effective remedy to bring the violation to an end and obtain redress before the domestic authorities. In particular, following the European Court's case-law, in 2012, legislative measures were taken to introduce an individual application with the Constitutional Court in respect of human rights violations. An individual in the applicant's situation could therefore pursue today the avenue of lodging an individual application to uphold his or her Convention rights, including in the present case. The Constitutional Court is

also able to award just satisfaction in cases where it finds a violation of human rights. In this respect, the Turkish authorities would like to recall that the European Court indicated in the *Hasan Uzun* case (application no. 10755/13) that the individual application to the Constitutional Court should be considered an effective remedy as of 23 September 2012.

26. The principle that the decisions must be sufficiently reasoned, which was particularly emphasized in the Court's judgment, was also adopted by the case-law of the Constitutional Court. For example, in a judgment rendered in 2013 the Constitutional Court found that the applicant`s right to a fair trial was violated on account of the lack of sufficient reasoning on the merits (application no. 2013/307, 16/5/2013). The court pointed out that "*Article 36 § 1 of the Constitution guarantees that everyone has the right to litigation either as plaintiff or defendant and the rights to claim, defence and a fair trial. The right to legal remedies enshrined in this article is not only a fundamental right in itself but also one of the most effective guarantees which ensure duly exercise of the other fundamental rights and freedoms and their protection. In this regard, it is clear that Article 141 of the Constitution which sets out that all kinds of decisions and judgments rendered by the courts shall be written with reasoning is to be taken into consideration in determination of the scope of the right to legal remedies (, §30).*

III.e. Training and Awareness Raising Activities

27. The Government has ensured that training and awareness raising activities were carried out in line with the ECtHR judgments.

28. In this regard, between 2014 and 2016, vocational training programs were organized for judges on twenty two (22) topics concerning civil proceedings. During these programs, presentations were made concerning the fact that court's decisions and judgments must include sufficient reasoning and concerning the issues required to be included in the reasoning of decisions and judgments.

29. Within the scope of the vocational training provided for candidate judges receiving training in the Academy, a four-hour course entitled "Reasoning in the Court's Decisions in

the light of the Case-law of the European Court of Human Rights" is included in the curriculum.

III.f. Publication and Dissemination

30. The Turkish authorities ensured that the European Court's judgment has been translated in Turkish and published on its official website which has been made available to the public and legal professionals alike http://hudoc.echr.coe.int/tur#{"fulltext":["gereksar"]}, which has Turkish interface.

31. The Turkish authorities also ensured that the European Court's findings have been disseminated among the competent bodies to ensure that similar violations are prevented. To this end, the European Court's judgment has been transmitted together with an explanatory note on the European Court's findings to the court rendering the relevant judgment, the Supreme Administrative Court and relevant institutions.

III.g. *Emine ÖZDEMIR and others* (Application no. 5854/10), *Nurten ERSOY and others* (Application no. 12874/07) and *Fatma KARATAŞ and others* (Application no. 39900/10)

32. The authorities are also of the opinion that in some applications pending before the European Court, such as *Emine ÖZDEMIR and others* (Application no. 5854/10), *Nurten ERSOY and others* (Application no. 12874/07) and *Fatma KARATAŞ and others* (Application no. 39900/10) which were communicated with related questions to *Gereksar and others* judgment, the applications were lodged on before the delivery of this judgment (1 February 2011) and the Court has not delivered any judgments about those applications yet. Therefore there is no need to take individual measures regarding these applications. On the other hand, taking into account the fact that the incidents date back before the delivery of the judgment of *Gereksar and Others*, it is observed that the general measures which were taken are sufficient. In other words, these applications pending before the Court date back before the relevant judgment finding a violation, and they cannot be interpreted as meaning that the general measures are not sufficient.

33. The Government therefore considers that no further general measures are necessary and the above-mentioned measures are capable of preventing similar violations including the mentioned cases newly communicated but previously lodged on.

IV. CONCLUSIONS

34. In light of what the Government has submitted in terms of the individual and general measures about how the applicant was redressed for the negative consequences of the violation and how the probable future violations are to be prevented, the Government considers that all necessary general and individual measures which Turkey is obliged to take under Article 46 § 1 of the Convention have been properly taken. Taking those all into account, the Committee of Ministers is respectfully invited to close its examination thereof.