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Communication from Turkey concerning the case of ERKOL GROUP v. Turkey (Application No. 50172/06)

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

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Communication de la Turquie concernant l'affaire ERKOL GROUP c. Turquie (requête n° 50172/06)
(anglais uniquement)

Ankara, April 2018

REVISED ACTION REPORT
Erkol v. Turkey (no.50172/06) Group of Cases

I. CASE DESCRIPTION

1. There are five cases supervised under *Erkol* group of cases.
2. These cases concern the violation of the applicants' right to the presumption of innocence. In the cases at hand, the liability of applicants, who were defendants in compensation claims lodged on the basis of a preceding criminal case, was based on the findings set forth in these criminal cases.
3. The European Court noted that in civil proceedings the applicants were regarded as guilty of the crimes with which they were charged, even though there was no a final conviction rendered as a result of criminal proceedings. Therefore, the fact that the applicants were considered as having committed the offence in civil proceedings even though a decision of acquittal/suspension of the proceedings was rendered regarding the applicants as a result of the criminal proceedings resulted in the violation of right to the presumption of innocence (Article 6§2).

II. INDIVIDUAL MEASURES

4. The Turkish Government has taken measures to ensure that the violations at issue have ceased and that the applicants are redressed for their negative consequences.

Reopening of Proceedings

5. The applicants can request reopening of the impugned civil proceedings upon the finding of a violation by the European Court.
6. In *Fazlı Diri* and *Erkol*, the applicants requested reopening of the civil proceedings. The domestic court granted leave for reopening of the proceedings. As a result, the applicants' claim for severance payment was admitted on the grounds that the decision of suspension of conviction was not a decision having the nature of a final criminal conviction.
7. In *Kemal Coskun*, the applicant requested reopening of the civil proceedings as well. The proceeding is still pending.
8. In the remaining cases, the applicants did not request for reopening of the proceedings.

Just Satisfaction

9. The Court awarded just satisfaction in respect of non-pecuniary damage in *Erkol, Fazlı Diri, Çelik (Bozkurt)* and *Coskun* cases. In *Alkası*, the Court considered that there was no need to award the applicant any sum for damages.

10. The Government ensured that the just satisfaction amounts awarded was paid the applicants as well as costs and expenses, i.e. within the deadline set by the Court.

11. In this sense, the Turkish authorities consider that all necessary individual measures have been taken and no other measures are required in this respect.

III. GENERAL MEASURES

12. At the outset, the Turkish authorities would like to point out that the violations at hand resulted from judicial practices. Legislative provisions did not pose a problem with regard to judgments in question. Moreover, in the judgments, the European Court did not note a systemic problem.

13. In this respect, the Turkish authorities believe that the relevant general measures should involve alignment of domestic courts` practices with the Court`s findings in these cases.

III.a. Case-Law of Court of Cassation

14. Relationship between civil and criminal proceedings are regulated pursuant to Article 74 of the Turkish Code of Obligations, which reads as follows: "*When the judge is deciding on whether the person who inflicted damage was at fault or had the power of discernment, he/she is bound neither by the provisions of criminal law concerning liability, nor by the acquittal decided by a criminal court judge. Similarly, the civil court judge is not bound by the criminal court judge's decision with respect to evaluation of the fault and determination of the extent of damage*".

15. In the aforementioned provision of the Turkish Code of Obligations, it is stated that the decision of acquittal rendered in a criminal case has not a binding effect on the civil court adjudicating on the same matter. In addition, it is assessed that, in doctrine and practise, the material facts that form the reasoning of an acquittal decision are binding on the civil court judge. In this connection, the Government draws the Committee of Ministers' attention to the case-laws of the Court of Cassation, which are as follows:

16. “Even though the criminal court's decision of acquittal is not binding on the civil court judge pursuant to Article 74 of the Code (Law no. 6098), it is beyond dispute that the material facts outlining the rationale of the acquittal are binding on the civil court judge (...). When the instant case is viewed within the framework of these arrangements, in particular, when the reasoning for the decision of acquittal concerning defendant Reşide is assessed together with the evidences in the case-file, it is not possible to accept that Reşide acted in cooperation with other convicted defendants Fahri and İbrahim and that she had ill-intentions.”(Annex 1). “(...) The civil court, as a rule, is not bound by the provisions of the criminal law in regard to fault and liability (Article 53 of the Code of Obligations, Law no. 818, Article 74 of the Turkish Code of Obligations Law no. 6098). However, the facts of the case at hand are also binding on the civil court judge. Accordingly, civil court judge, when determining the scope of the compensation, must take the material fact, which was detected in the criminal court, into consideration (...)” (Annex 2).

17. In the criminal proceedings, in respect of the means of proof, the criminal court judge is at an advantage when compared to its counterpart in the civil court. Therefore, Article 74 above, does not preclude the finalised provision of the criminal court, which established the material causality, from binding on the civil court judge. In addition to this, the binding effect of the criminal court's decisions are based on the idea of the re-establishment of the public order and prevention of contradictory decisions rather than the amendment to the Law. The Court of Cassation, in one of its quashing decisions, emphasised the same point “(...) The case is concerned with compensation of the damages resulting from the alleged abuse of the power of the attorney. The case was dismissed by the domestic courts pursuant to the facts explained above. Pursuant to Article 53 of the former Code of Obligations Law no. 818 (Turkish Code of Obligations Article 74), material facts established in the criminal court judge’s decision of conviction together with the acquittal decision that determined that material facts are binding on the civil court judge (...). In this respect, although the court should have established whether the criminal case against the applicants in question were finalised by the court, and waited for it to become finalised in the negative and rendered a decision while taking into account the decision ordering their acquittal, it, instead, rendered the decision in writing, which was deemed unsuitable and thus it had to be quashed. (Annex 3).

18. Similarly, “(...) Even though the criminal court judge’s decision of acquittal is not binding on the civil court judge, the criminal court judge’s assessment that the material incident had taken place in this way is binding on the civil court judge (...)” (Annex 4). “(...) According to the criminal file submitted by the 3th Chamber of the Bursa Assize Court, it is determined that the sign under the cheques, which are the subject matter of the case, did not belong to the claimant and that the decision became final. In this case, the court did not find it appropriate to deliver a written decision

with incomplete examination, as a decision must be made in accordance with the result of the of the criminal court's decision, pursuant to Article 74 of the Turkish Code of Obligations (...)" (Annex 5).

19. In addition, the civil court judge, who is bound by both the material facts determined in the criminal court and the final decision of conviction pursuant to this, is not bound by the provisions of the Criminal Law concerning the extent of liability, pursuant to Article 74 of the Turkish Code of Obligations. Because, unlawfulness constitutes the objective and the liability constitutes the subjective elements of the tortuous act. Therefore, the civil court judge, if deemed necessary, shall order the reassessment of liability, independent of the extent of liability determined by the criminal court. The civil court judge cannot decide that there was no liability on the part of the defendant, despite criminal court's decision of conviction.

20. This point is further emphasised in one of the judgments of the General Assembly of the Court of Cassation in Civil Matters: "(...) It is beyond doubt that, in view of this clear provision, the civil court judge is not bound by facts such as criminal court's acquittal decision, liability and its extent, amount of the loss, and causality. However, it must be noted that, according both to the doctrine and to the well-established case-law of the Court of Cassation, it is accepted that the civil court judge would be completely bound by the material facts and "unlawfulness of the act" which have been established by the criminal court judge (...)." (Annex 6).

21. In another judgment, the General Assembly of the Court of Cassation in Civil Matters quashed the decision, holding that the fact that the domestic court partially accepted the case on the ground that "the claimant have duly done his job and it was established that the defendant committed the offence of false accusation" despite the absence of a final sentence imposed on the applicant (a decision on suspension of the pronouncement of the judgment was issued) was unlawful (Annex 7-8). The General Assembly of the Court of Cassation has a large number of quashing decisions in this respect (Annex 9-10)

22. It flows from the domestic courts over-mentioned case law that the civil courts are not bound by the conclusion reached by the criminal courts. However, the facts found by the criminal courts are of a binding effect on civil courts as well. In this regard, the judge of a civil court, when deciding on the civil aspect of a case, cannot consider a party to the case as convicted in spite of a judgment of suspension or acquittal rendered by the criminal court.

III.b. Individual Application Right before the Constitutional Court

23. The authorities would furthermore like to highlight that a person in the applicants' 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 judgment, in 2012, the legislative measures were taken to introduce an individual application before the Constitutional Court in respect of human rights violations. An individual in the applicants' 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 case of finding a violation of human rights.

24. The Constitutional Court decided that there had been a violation of the applicant's right to presumption of innocence on the ground that even though a decision of discontinuation had been rendered in the criminal proceedings against the applicant due to the expiry of the statute of limitations, it was accepted in the civil case, which he brought in order to be reinstated, that he had committed the acts which were the subject-matter of the criminal proceedings and he was found guilty (see the judgment of the Constitutional Court on *Sebğatullah Altın* 2013/1503, 2 December 2015¹).

25. "On the other hand, it is found useful to reiterate that the criminal law and criminal procedure law and disciplinary law are subject to different rules and principles. Accordingly, the conduct of the civil servant may require disciplinary liability, apart from complying with the definition of the crime. In such cases, criminal procedure and disciplinary investigation are conducted separately. The criminal court's decision is not directly binding on disciplinary authorities, apart from the decisions rendered following the criminal procedure that the relevant person did not commit the imputed offence. However, during assessments in this regard, making assessments that he is not free of guilt should be refrained from, even if its based on the lack of evidence" (*Sebğatullah Altın*, par. 29).

26. Consequently, violation in questions, as demonstrated by the judgments of the Court of Cassation and the Constitutional Court, is an isolated event. In other words, there are currently no similar issues, in practice and legislation. Several chambers of the Court of Cassation and the case-laws of the General Assembly of the Court of Cassation in Civil Matters guided the first-instance court in this context. Moreover, in the event of a wrong assessment by the Court of Cassation, the

¹ <http://kararlaryeni.anayasa.gov.tr/BireyselKarar/Content/a3bee899-837d-490a-ab4d-e4f90ce3b2d8?wordsOnly=False>

Constitutional Court carries out an examination in accordance with the case-law of the Court through individual applications..

27. In the light of the information given above, it is assessed that the issue that gave rise to the violation is resolved.

III.c. Publication and dissemination measures

28. The Turkish authorities ensured that the European Court's judgment be translated into Turkish and published on its official website which was made available to the public and legal professionals alike (<http://hudoc.echr.coe.int/>).

29. Furthermore, the European Court's judgments have been transmitted together with an explanatory note on the European Court's findings to the domestic courts involved in this case as well as to other relevant courts such as the Constitutional Court, the Court of Cassation, the courts which rendered the impugned decisions and the relevant institutions.

30. The Government therefore considers that the above-mentioned measures are capable of preventing similar violations.

IV. CONCLUSION

31. In light of what the Government has submitted in the individual and general measures about how the applicants were 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 all these elements into account, the Committee of Ministers is respectfully invited to close the *Erkol* group of cases examination thereof.