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Meeting: 1310<sup>th</sup> meeting (March 2018) (DH)

Item reference: Action report (13/02/2018)

Communication from Turkey concerning the case of EBRU & TAYFUN ENGIN COLAK v. Turkey (Application No. 60176/00)

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Réunion : 1310<sup>e</sup> réunion (mars 2018) (DH)

Référence du point : Bilan d'action

Communication de la Turquie concernant l'affaire EBRU & TAYFUN ENGIN COLAK c. Turquie (requête n° 60176/00) (*anglais uniquement*)

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## **ACTION REPORT**

Ebru and Tayfun Çolak v. Turkey (60176/00)  
Judgment of 30 May 2006, final on 30 August 2006

### **I. CASE DESCRIPTION:**

1. The case concerns a violation of the applicants' right to their private life on account of the failure of the domestic courts to strike a fair balance between the applicants' right to establish the truth as to paternity without undue delay and the right of the alleged father not to have to undergo DNA tests (violation of Article 8).
2. The Court held that the inability of the domestic courts to settle the paternity issue in a timely manner left the applicants in a prolonged state of uncertainty as to the child's individual identity (§ 97 of the judgment).
3. The case also concerns a violation of the applicants' right to a fair trial in the paternity proceedings which lasted between 2 April 1992 and 18 January 2001 (violation of Article 6).
4. Lastly, the case concerns a violation of the applicant's right to an effective remedy on this account (violation of Article 13).

### **II. INDIVIDUAL MEASURES**

5. The Turkish authorities have made measures available to be taken and those individual measures are capable of ceasing the violation at hand.

#### ***Just Satisfaction***

6. The European Court awarded just satisfaction in respect of the non-pecuniary damage sustained by the applicant. The just satisfaction awarded has been paid the applicant as well as costs and expenses, i.e. within the deadline set by the Court.
7. The authorities consider that no other individual measures are required, given the fact that the applicant was a union, not the individuals affected adversely.

### **III. GENERAL MEASURES**

8. The Turkish Government has taken a number of measures aiming at preventing similar violations. These measures include, in particular, legislative measures and measures on the publication and dissemination of the Court's judgment.

### **III.a. The Right to Respect for Private and Family Life**

9. Paternity cases have been placed under regulation in the Turkish Civil Code with a view to establishing the relation of paternity between a child and a father and protecting the rights of the child.

10. Article 284 of the Turkish Civil Code reads “*In the cases concerning paternity, without prejudice to the following rules, the provisions of the Code of Civil Procedure (Hukuk Usulü Muhakemeleri Kanunu-Law No. 1086) shall apply: (1) The judge shall inquire ex officio the material facts and assess the evidence without constraint; (2) The parties to the case and the third parties are obligated to consent to the medically non-dangerous inquiries and examinations which are imperative for the ascertainment of paternity. If the defendant refuses to consent to the inquiry and examination ordered by the judge, the latter may, in view of present circumstances, presume that the expected result of these is against the defendant.*”

11. Accordingly, in the cases where the defendant does not consent to inquiry and examination, the judge shall be able to consider this fact as being against the defendant and deliver a decision.

12. In this respect, the Government would like to recall that in *Mikulic v. Croatia*, where a similar violation had been found, the Committee of Ministers decided to close its examination on the execution of the judgment after the adoption of an amendment similar to that of the Turkish Civil Code (see Resolution CM/ResDH 2006(69)).

13. In addition to the provision in the Turkish Civil Code which reads “*may ... presume that the expected result of these is against the defendant*”, a new provision has also been introduced under Article 292 of the Code of Civil Procedure (Law no. 6100) (*Hukuk Muhakemeleri Kanunu*). As of the effective date of the Code of Civil Procedure, Article 292 has been implemented in respect of paternity cases. The Article provides as follows: “*Everyone is obligated to agree to undergo blood or tissue collection procedures for the purposes of ascertaining paternity, provided that it is required with respect to resolution of the dispute, is in accordance with scientific data, and does not endanger the person’s health. In the cases of non-compliance with this obligation without just cause, the judge shall decide to order the examination to be performed by force.*”

14. Therefore, unlike the Turkish Civil Code, the Code of Civil Procedure enables performing an examination by force. On the other hand, since the collection of blood or tissue samples from a person by force would constitute an interference with the person’s physical

integrity, certain requirements for the collection of blood or tissue samples were sought within the law.

15. When the two provisions specified above are read together, the requirements sought for the imposition of the obligation to consent to medical procedure for the purposes of establishing a person's paternity are: the presence of a case concerning paternity; existence of best interest in performing a medical procedure; and lastly, the imperativeness of medical inquiry and examination for the elimination of doubts and the resolution of the case. Furthermore, the examination must not pose a danger to the person's health.

16. Moreover, the judgments delivered by the Court of Cassation also indicated, in paternity cases, that all available means of medicine should be used and that the judge has the power to inquire *ex officio* the material facts and assess the evidence without constraint. In fact, the Court of Cassation quashed a decision by holding as follows: *"In the cases concerning paternity, the fact that the defendant acknowledges the issue raised in the case against him is not sufficient in itself for the delivery of a decision. The judge should make use of every available means of technology and medicine in this respect. The court did not determine the blood types of the child and the parents, nor did it order any medical examination or inquiry. It is the court's duty to determine medically whether the plaintiff is the father following the examination; obtain a report from the Forensic Medicine Institute in this regard; and deliver a decision in accordance with the conclusion to be reached via assessment of all the evidence. Delivering a decision with incomplete examination is against the procedure and the law."* (The 2<sup>nd</sup> Civil Chamber of the Court of Cassation, judgment no. 2009/1912 E. 2009/5348 K.).

### **III.b. Lengthy Proceedings in General**

17. Despite the fact that it is related with Article 6 of the European Convention on Human Rights, the Government would like to refer the *Ormanci* group of cases closed by the CM since it includes the same measures from the view of speedy proceedings.

18. Within the scope of the execution of the judgment of *Ormanci v. Turkey* (43647/68) which was considered to have similarities with the present case in respect of the main grounds for the violation concerning the requirement of reasonable time both criminal and civil courts, by the Resolution no. 2011/298 adopted in the 1215th DH meeting, the Committee of Ministers stated that all necessary measures have been taken with respect to the excessive length of proceedings and the lack of an effective remedy on the subject by Turkey, and it

terminated the execution process (see Resolution CM/ResDH (2014)298, 1215th meeting (DH), 17 December 2014).

19. The Government is of the opinion that the measures taken are objectively capable of preventing similar violations and no other measures are required.

### **III.c. Individual Application Right before the Constitutional Court**

20. 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 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. 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.

### **III.d. Publication and dissemination measures**

21. The Turkish authorities ensured that the Court's judgments were translated in Turkish and published on its official website which have been made available to the public and legal professionals alike (<http://hudoc.echr.coe.int/tur?i=001-121066>).

22. The Turkish authorities also ensured that the translated judgments of the Court have been disseminated among the competent bodies to ensure that similar violations are prevented. To this end, the translated judgment has been transmitted together with an explanatory note on the Court's findings to the relevant courts such as the Constitutional Court and the Court of Cassation.

## **IV. CONCLUSIONS**

27. In light of what the Government has submitted in the individual and general measures about how the applicants was redressed for the negative consequences of the violation and how the probable future violations are to be prevented, the Government considers that all

February, 2018

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 its examination thereof.