SECOND SECTION

CASE OF FENER RUM PATRİKLİĞİ

(ECUMENICAL PATRIARCHATE) v. TURKEY

(Application no. 14340/05)

JUDGMENT

(*Just satisfaction*)

STRASBOURG

15 June 2010

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 Fener Rum Patrikliği (Ecumenical Patriarchate) v. Turkey,
The European Court of Human Rights (Second Section), sitting as a Chamber composed of:
Françoise Tulkens, *President,*
Ireneu Cabral Barreto,
Danutė Jočienė,
Dragoljub Popović,
András Sajó,
Işıl Karakaş,
Guido Raimondi, *Judges,*
and Françoise Elens-Passos, *Deputy Section Registrar,*
Having deliberated in private on 25 May 2010,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 14340/05) 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 Fener Rum Patrikliği (the Ecumenical Patriarchate) ("the applicant"), on 19 April 2005.

2. In a judgment delivered on 8 July 2008 (the "judgment in the first proceedings"), the Court found that there had been a violation of Article 1 of Protocol No. 1. It also felt that it was not necessary to examine separately the complaints based on Articles 6 and 14 of the Convention, the latter taken in conjunction with Article 1 of Protocol No. 1.

3. On the basis of Article 41 of the Convention, the applicant explained that the most appropriate way the Government could make good the prejudice caused would be to return the disputed property to the applicant. If the Government were not able to do so, the applicant said that it was prepared to consider compensation, and claimed an amount equivalent to the market value of the property, which it considered to be 80 000 000 euros (EUR). The applicant also claimed EUR 10 000 for the moral prejudice suffered. Additionally, it requested EUR 50 000 to cover all the costs and expenses incurred during the proceedings brought before the national courts and the bodies of the Convention.

4. As the matter of application of Article 41 of the Convention was not included, the Court reserved it and invited the Government and the applicant to submit to it in writing within six months their observations on this question and more particularly to inform the Court of any agreement they may reach.

5. Both the applicant and the Government lodged observations.

The facts after delivery of the judgment in the first proceedings

6. On 22 January 1997, as indicated in the judgment in the first proceedings (§§ 13-16), the General Directorate of Foundations, invoking Article 1 of Act No. 2762, issued a decision in which it qualified the Foundation of the Büyükada Greek Orphanage for Boys ("the orphanage foundation") – in favour of which ownership had been transferred – as a "disused" foundation (*mazbut*), whereas until that date it had belonged to the category of "attached" foundations (*mülhak*).

7. Thereafter, on 4 April 1997, the orphanage foundation applied to the administrative court of Istanbul for the cancellation of the decision. Initially, its application was rejected.

However, further to an application for rectification lodged by the applicant, the disputes committee of the Council of State, in a judgment delivered on 4 December 2008, held more specifically that the orphanage foundation, which owned a certain number of properties and gave scholarships to a certain number of pupils, could not be qualified as a "disused" foundation. This reversed the judgment delivered on 29 September 2006 and adopted by the administrative court, which had confirmed the disputed classification.

8. The Directorate General for Foundations lodged an application for rectification against the decision of 4 December 2008. The file shows that this procedure is still pending before the administrative courts.

9. The applicant submitted to the Court a letter dated 31 March 2006, signed by the general council of the orphanage foundation, in which the council declares that it had never asked for the disputed property to be listed in the name of the foundation in question.

AT LAW

10. According to Article 41 of the Convention,

> "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. Prejudice suffered

1. Arguments put forward by the applicant

11. From the outset, the applicant has stressed the particular nature of the property at issue and its importance for the Greek Orthodox community in Turkey. The property consists of a plot of land with an area of 23 255 sq.m., located at the top of the main hill on the island of Büyükada (Istanbul), on which stand a main building of five storeys, initially intended for use as a hotel, and a two-storey annexe. The main building, erected between 1898 and 1900, is one of the oldest and largest wooden palaces in Europe, of unique cultural, architectural and historical value, and has provided a home for more than 3 000 Greek orphans.

12. Moreover, to demonstrate the importance of the disputed property for the Greek community in Turkey, and for the Ecumenical Patriarchate, His Holiness the Ecumenical Patriarch Bartholomeos I submitted a note to the Court on 4 September 2007. He believes that, in view of its lengthy period of assignment and use as an orphanage, the property at issue is one of the identifying symbols of the Greek minority in Turkey and of the historical heritage of the Ecumenical Patriarchate.

13. The applicant also submitted a letter from the Ecumenical Patriarch Bartholomeos I to the European Commission on 25 February 2009, in which His Holiness expressed his intention to create, within the building at issue, a permanent centre dedicated to education on environmental issues.

14. The applicant also refers to the decision of the disputes committee of the Council of State, which had overturned the judgment of 29 September 2006, thereby considering that the orphanage foundation could not be qualified as a "disused" foundation (paragraph 7 above).

15. In the light of these characteristics, the applicant feels that the most suitable way for the Government to make good the prejudice suffered would be to restore ownership of the disputed property. Furthermore, referring to the letter of 31 March 2006 signed by the general council of the orphanage foundation, the applicant stresses that the foundation has never

requested that the property at issue be listed in the name of the orphanage foundation (paragraph 9 above).

16. If ownership is not restored, the applicant claims both full compensation and a sum covering the market value of the property at issue. In support of its claims, it refers to two experts' reports, drawn up on 19 August 2004 by Som Kurumsal Gayrimenkul Değerlendirme ve Danışmanlık Hizmetler A.Ş. (a public company providing expert reports and estimates in respect of property) and 21 August 2007 by the public company Lambert Smith Hampton (Hellas). The first report concluded that the market value of the goods on the date of the estimation was 41 000 000 Turkish pounds (TRY) (approx. EUR 22 777 777). The second expert's report concluded that the market value of the goods was EUR 57 500 000.

17. The applicant requests that the Court take account of the estimation made by the public company Lambert Smith Hampton (Hellas).

18. It also claims EUR 10 000 in respect of the moral prejudice suffered.

2. Arguments put forward by the Government

19. The Government observes at the outset that the title of ownership of the disputed property is currently listed in the land register in the name of the orphanage foundation. Referring to the decision of the disputes committee of the Council of State which overturned the judgment of 29 September 2006, holding that the orphanage foundation could not be qualified as a "disused" foundation, it recalls that proceedings concerning the status of the foundation are currently pending before the administrative courts.

20. It emphasises that, if the aforementioned proceedings should result in the cancellation of the decision to classify the foundation as a "disused" foundation within the meaning of the decision of the disputes committee of the Council of State, it would not have any power in respect of the property at issue since the orphanage foundation would become the legitimate owner of the property.

21. It also affirms that, whatever the solution adopted by the national courts, the property at issue will still belong to the Greek community in Turkey.

22. Even if the application for rectification lodged by the Directorate General for Foundations were to be favourably received by the Council of State, the Government would only have very limited power in respect of the property at issue, given that this would be managed by the Directorate in the name of the orphanage foundation, in compliance with its aims.

23. In the circumstances, according to the Government, granting compensation constitutes the only adequate means of making good the prejudice at issue. The compensation would amount to the value of the land and the orphanage building. In this respect, concerning the material prejudice suffered, the Government contests the evaluation made by the experts designated by the applicant, which it considers to be excessive and unacceptable. It also claims that no amount of money is due to the applicant for non-enjoyment of the property at issue on the grounds that the applicant had never really used the property at issue. It also recalled that the applicant made no opposition to the amount declared by the Directorate General for Foundations when it applied for cancellation of the title of ownership. This amount was TRY 1 100 *[sic]*.

24. It also submits an estimate first made on 11 September 2007 and updated on 13 March 2009 by a committee composed of four civil servants from the directorate of town-planning projects and schemes at the prefecture in Istanbul, according to which the value of the property is TRY 10 830 856 (approx. EUR 5 014 285).

25. As for the moral prejudice suffered, it is the Government's opinion that in the present case the recording of a violation represents sufficient reparation.

3. Appreciation by the Court

26. The Court recalls that a judgment recording a violation places the respondent State under a legal obligation to put an end to the violation and to remove the consequences in such a way as to re-establish the situation prior to the violation, as far as possible (see, for example, *Brumărescu v. Romania* (just satisfaction) [GC], n° 28342/95, § 19, ECHR 2000-I).

27. It also recalls that contracting States involved in a case are in principle free to choose the means they will use to comply with a judgment recording a violation. This power of appreciation concerning the means of complying with a judgment reflects the freedom of choice that is coupled with the primordial obligation imposed on contracting States by the Convention, that of ensuring observance of the rights and freedoms guaranteed by the Convention (Article 1). If the nature of the violation permits a *restitutio in integrum*, it is incumbent on the respondent State to do so, as the Court has neither the competence nor the practical possibility of achieving this itself. If on the other hand national law does not permit the complete removal of the consequences of the violation, Article 41 empowers the Court, if appropriate, to grant the injured party such satisfaction as it deems appropriate (*ibid*, § 20).

28. In the present case, the Court observes that the case involves the cancellation of the applicant's title of ownership by a court decision. The property was acquired by the applicant in 1902, and paid for out of its own funds. In 1903, use of the property was transferred to the orphanage foundation, and this use was indicated in the land register. However, the applicant has always been indicated in the land register as being the "owner" of the property at issue.

29. Having agreed, in its judgment in the first proceedings, that the disputed property belonged to the applicant, the Court felt that the cancellation of its title of ownership constituted interference with that party's right to respect for its property (judgment in the first proceedings, § 66). It also noted that the national courts, which had cancelled the applicant's title of ownership, had decided to transfer ownership of the disputed property to the orphanage foundation, qualified by the Directorate General for Foundations as a "disused" foundation having ceased its charitable activities. In consequence, the Court concluded that the property at issue no longer belonged to the applicant and that it would be managed by the Directorate, a public establishment under the supervision of the Prime Minister (judgment in the first proceedings, § 68).

30. In its judgment in the first proceedings, the Court, although it did not consider that the privation of ownership at issue was arbitrary, issued reservations as to its justification, expressing itself in the following terms[1]:

> 100. (...) even considering that the property at issue was intended for a specific purpose for many years, there is no reason for thinking that such use should void the right of ownership. Even though the fact that the respondent Government wanted to maintain the initial intended use of the property at issue does not in itself raise any problems, the Court feels that the Turkish authorities could not carry out such a privation of ownership without making provision for adequate compensation for the applicant. It has to be said that in the present case the applicant has not received the slightest compensation.
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> 101. In the circumstances, even supposing that it may be possible to demonstrate that the privation of ownership was provided for by law and was in the interest of public utility, the Court finds that the fair balance to be striven for between the protection of ownership and the demands of the general interest has been upset and that the applicant has borne a special and exorbitant burden. There has therefore been a violation of Article 1 of Protocol No. 1.

31. In the light of this reasoning, the Court feels that the re-listing of the disputed property in the applicant's name in the land register would put the party concerned as far as possible in a situation equivalent to that in which it would have found itself if the requirements of Article 1 of Protocol No. 1 had not been ignored. In this respect, the Court cannot allow the Government's argument that granting compensation constitutes the only suitable means of

[1] Translator's note – there is no official English translation of the judgment.

making good the prejudice at issue. On this point, it refers to paragraph 61 of the judgment in the first proceedings:

> (...) It is true that, from the start, the disputed building has been allocated to a specific purpose, namely an orphanage, but the Court does not see why such use would per se exclude the applicant being its owner.

32. Furthermore, the Court gives importance to the fact that following the adoption of legislation amending the scheme applicable to foundations, the orphanage foundation did not claimed any title of ownership (judgment in the first proceedings, § 64). In this respect, it takes note of the letter from the General Council of the orphanage foundation, in which it declares that it has never requested that the property at issue be registered in the name of the orphanage foundation (paragraph 9 above).

33. Consequently, the Court finds that granting compensation to the applicant cannot constitute adequate redress, inasmuch as this solution tends essentially to confirm a situation deemed contrary to the demands of Article 1 of Protocol No. 1. Moreover, the Court takes note of the decision made by the disputes committee of the Council of State on 4 December 2008, according to which more specifically the orphanage foundation, which owned a certain number of properties and gave scholarships to a number of pupils, could not be declared "disused".

34. The Court also recalled having judged, in the case of *Bozcaada Kimisis Teodoku Rum Ortodoks Kilisesi Vakfı v. Turkey (no. 2)* (nos. 37646/03, 37665/03, 37992/03, 37993/03, 37996/03, 37998/03, 37999/03 and 38000/03, § 68, 6 October 2009), that the restitution of the cemetery of the Greek community on the island of Bozcaada, a chapel, and a former monastery, property that had specific characteristics, constituted the only adequate means of redress (see, *mutatis mutandis*, *Vontas et al. v. Greece*, n° 43588/06, § 50, 5 February 2009). It observes that these considerations apply *mutatis mutandis* to the present case, in view of the importance of the disputed property among the applicant's assets.

35. In conclusion, the Court finds that, in the present case, the re-listing in the applicant's name of the title of ownership of the property at issue in the land register constitutes the only adequate means of redress in respect of the prejudice suffered. There is therefore no need to pronounce on any pecuniary compensation.

36. As for the prejudice suffered, the Court considers that the violation of the Convention has caused the applicant a degree of non-pecuniary injury, resulting from the feeling of impotence and frustration when faced with dispossession of its property. Deliberating on the fairness of the matter, it awards the applicant EUR 6 000 in this respect.

B. Costs and expenses

37. The applicant claims the refund of TRY 53 651.12 for expenses incurred before the national courts. In support of its claims, it submits a receipt for the payment of a debt in respect of file no. 2009/6244, ordered by the court of first instance of Adalar on 20 April 2005 (file nos. 2005/9E and 2005/40K). It also claims EUR 50 000 to cover all the other costs and expenses incurred in the proceedings brought before the national courts and the bodies of the Convention. It presents a price list and a breakdown of the hours of work carried out by its counsel.

38. The Government feels these claims are unreasonable. As to costs and expenses, it feels that the amount requested is exorbitant and has not been backed by sufficient supporting documents.

39. According to Court jurisprudence, an applicant may only obtain a refund of its costs and expenses if it establishes their reality, their necessity and the reasonable level of the rate applied. Moreover, when the Court notes that the Convention has been violated, it does not

allow the applicant refund of the costs and expenses incurred before the national courts unless these have been incurred in order to prevent or correct the violation.

40. In respect of the amount claimed in refund of expenditure incurred before the national courts, it is not certain that these claims are backed by sufficient supporting documents to fully satisfy the demands of Article 60 § 2 of the Court's Rules. Moreover, the Court finds the amount requested in legal fees excessive. It therefore considers that only part of the costs should be refunded. Given the circumstances of the case, it finds it reasonable to award the applicant EUR 20 000.

C. Default interest

41. The Court deems it appropriate to base the rate of the default interest on the interest rate of the marginal loan facility of the European Central Bank plus three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares*
   a) that, within three months of the date on which the present judgment becomes definitive under Article 44 § 2 of the Convention, the respondent State must have the disputed property re-listed in the applicant's name in the land register;
   b) that the respondent State, within three months of the date on which the judgment becomes definitive in compliance with Article 44 § 2 of the Convention, should pay the applicant the following sums, to be converted into Turkish pounds at the rate applicable on the date of settlement:
      i. EUR 6 000 (six thousand euros), plus any amount that may be due for taxes, in compensation for the moral prejudice suffered,
      ii. EUR 20 000 (twenty thousand euros), plus any amount of taxes for which the applicant may be liable, to cover costs and expenses;
   c) that from the expiry of this period and until payment these amounts shall be increased by simple interest at a rate equal to that of the marginal loan facility of the Central European Bank plus three percentage points;

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

Done in French, and notified in writing on 15 June 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of the Court.

Françoise Elens-Passos	Françoise Tulkens
Deputy Section Registrar	President

JUDGMENT FENER RUM PATRİKLİĞİ (ECUMENICAL PATRIARCHATE) v. TURKEY
(JUST SATISFACTION)