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XENIDES-ARESTIS *v.* TURKEY
158 ILR 1

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Human rights — Right to property — Right to respect for home — Greek Cypriot applicant having home, property and possessions in northern Cyprus — Turkish military forces occupying northern Cyprus in August 1974 — Proclamation of “Turkish Republic of Northern Cyprus” — Turkish military forces forcing applicant to abandon her home, property and possessions — Applicant prevented from having access to, use and enjoyment of her home, property and possessions — Applicant lodging application with European Court of Human Rights — Admissibility of case — Whether Turkey lacking jurisdiction *ratione temporis* and *ratione loci* — Whether applicant lacking victim status — Whether applicant exhausting domestic remedies — Whether domestic remedy effective or adequate — Whether examination on merits required — *Loizidou v. Turkey* — *Cyprus v. Turkey* — Whether Turkey violating Article 8 of European Convention on Human Rights, 1950 and Article 1 of Protocol No 1

State responsibility — Human rights — Applicant alleging violations of her property rights under European Convention on Human Rights, 1950 — Alleged violations occurring within “Turkish Republic of Northern Cyprus” — Whether Turkey liable for alleged violations — *Loizidou v. Turkey* — *Cyprus v. Turkey* — Whether any changes since judgments adopted — Whether Turkey continuing to exercise overall military control over northern Cyprus — Whether any reasons to depart from conclusions in those cases

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War and armed conflict — Occupation — Turkish intervention in Cyprus in 1974 — Turkish military forces displacing Greek Cypriot applicant from her property in northern Cyprus — Applicant prevented from accessing, using and enjoying her home, property and possessions — Whether Turkey violating applicant's rights under Article 8 of European Convention on Human Rights, 1950 and Article 1 of Protocol No 1 — Whether violation continuing — United Nations Annan Plan for re-unification of Cyprus — Rejection of Annan Plan by Greek Cypriots — Whether having legal consequences for rights of displaced persons

XENIDES-ARESTIS *v.* TURKEY¹

(Application No 46347/99)

European Court of Human Rights (Third Section)

Admissibility. 14 March 2005

Merits. 22 December 2005²

Just Satisfaction. 7 December 2006³

(Ress, *President*; Cabral Barreto, Caffisch, Türmen, Hedigan, Traja and Gyulumyan, *Judges*)

SUMMARY:⁴ *The facts:*—The applicant, a Cypriot national of Greek-Cypriot origin, claimed to own half a plot of land in northern Cyprus (in the area of Ayios Memnon in Famagusta), which was gifted to her by her mother and on which her home, and other buildings, were situated. She also claimed to part own a plot of land with an orchard. The applicant maintained that she and her family had been forced to abandon their home, property and possessions in August 1974, after occupation by Turkish military forces, which had prevented her from having access to, using and enjoying them.

In 1974 Turkish forces intervened in Cyprus and took control of the northern part of the island following fighting with Republic of Cyprus forces. In 1983 the Turkish Cypriot administration proclaimed the north of Cyprus

¹ The names of the parties' representatives appear at p. 7. The Cypriot Government intervened under Article 36 of the Convention.

² This judgment became final on 22 March 2006.

³ This judgment became final on 23 May 2007.

⁴ Prepared by Ms Karen Lee, Co-Editor.

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to be an independent State called the “Turkish Republic of Northern Cyprus” (TRNC), which was unrecognized by any State other than Turkey.

The applicant lodged an application against Turkey alleging continuing violations of her right to respect for home under Article 8 of the European Convention on Human Rights, 1950 (“the Convention”)⁵ and the protection of her property under Article 1 of Protocol No 1.⁶ She also alleged that Turkey had violated Article 14 of the Convention,⁷ in conjunction with Articles 8 and 1, since she had been prevented from accessing, using and enjoying her home and property because she was Greek Orthodox and of Greek-Cypriot origin. Turkey argued that the case was inadmissible on the grounds of lack of jurisdiction *ratione temporis* and *ratione loci*, that the applicant lacked victim status and that domestic remedies had not been exhausted.

On 30 June 2003 the Law on Compensation for Immovable Properties Located within the Boundaries of the TRNC (“Law No 49/2003”)⁸ was enacted by the TRNC Parliament, and entered into force, under which a Commission⁹ was established to deal with compensation claims. On 31 March 2004 the United Nations finalized a Foundation Agreement–Settlement Plan (the “Annan Plan”) for the re-unification of Cyprus. Although approved in the Turkish-Cypriot referendum on 24 April 2004, the Annan Plan did not enter into force since it was not approved in the referendum held on the same day in the rest of Cyprus.

Decision as to Admissibility (14 March 2005)

Held (unanimously):—The application was admissible, without prejudging the merits of the case.

(1) In light of the findings in *Loizidou v. Turkey*,¹⁰ which were confirmed in *Cyprus v. Turkey*,¹¹ Turkey did not lack jurisdiction *ratione temporis* and *ratione loci*. Turkey was liable for alleged violations of Convention rights, including allegations of continuing interferences with the right to respect for home and property rights under Article 8 of the Convention and Article 1 of Protocol No 1 occurring within the TRNC. Since the Annan Plan had not come into force, no change had occurred since the adoption of those judgments with respect to inter-communal negotiations. Equal treatment of the two negotiating communities did not entail recognition of the TRNC. Turkey still exercised overall military control over northern Cyprus. The rejection of

⁵ For the text of Article 8 of the Convention, see p. 16 below.

⁶ For the text of Article 1 of Protocol No 1, see pp. 16-17 below.

⁷ For the text of Article 14 of the Convention, see p. 16 below.

⁸ For the text of Law No 49/2003, see pp. 9-15 below.

⁹ An Immovable Property Determination Evaluation and Compensation Commission was established on 30 July 2003 under Article 11 of Law No 49/2003, the text of which can be found at pp. 12-13 below.

¹⁰ 103 ILR 622 and 108 ILR 443.

¹¹ 120 ILR 10.

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the Annan Plan by the Greek Cypriots did not end the continuing violation of displaced persons' rights (pp. 23-4).

(2) The applicant could claim to be a victim within the meaning of Article 34 of the Convention. She was directly affected by the act in issue and had proof of ownership of the property (p. 26).

(3) The remedy proposed by Turkey did not satisfy the requirements under Article 35(1) of the Convention; it was not an "effective" or "adequate" means for redressing the applicant's complaints.

(a) While Article 35(1) of the Convention obliged potential applicants first to exhaust remedies provided by the national legal system, they were not so obliged if those remedies were inadequate or ineffective. An applicant might also be absolved from that obligation under "generally recognized rules of international law" if special circumstances existed. The respondent Government had to satisfy the Court of the existence of effective and accessible remedies which were capable of providing redress and offered reasonable prospects of success. Article 35(1) did, however, need to be applied flexibly, taking account of the legal and political context and the applicant's personal circumstances. Furthermore, international law recognized the legitimacy of legal arrangements and transactions in certain situations akin to those in the TRNC and that the effectiveness of remedies provided therein had to be considered in those specific circumstances on a case-by-case basis (pp. 52-3).

(b) Turkey's proposed compensation-based remedy could not fully address the negation of the applicant's property rights. Although compensation was foreseen, there was no complete system of redress regulating the basic aspect of the interferences complained of. Law No 49/2003 only offered damages concerning pecuniary loss for immovable property. There was no possibility of restitution of the property withheld. The Law did not address the Article 8 and 14 complaints and was vague as to its temporal application; the compensation commission lacked credibility since it was mainly composed of members living in or on Greek-Cypriot property (pp. 54-5).

(4) The complaints raised serious issues of fact and law under the Convention, the determination of which required an examination on the merits. The complaints were not manifestly ill-founded within the meaning of Article 35(3) of the Convention; no other ground for inadmissibility had been established (p. 56).

Judgment on the Merits (22 December 2005)

Held:—There had been a violation of Article 8 of the Convention and Article 1 of Protocol No 1.

(1) (unanimously) Turkey's preliminary objection concerning the victim status of the applicant was dismissed. There was no reason to depart from the admissibility stage findings (paras. 14-15).

(2) (by six votes to one, Judge Türmen dissenting) There had been a violation of Article 8 of the Convention. The applicant had been unable to

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gain access to, use and enjoy her home in Famagusta. The complete denial of the right of the applicant to respect for her home in northern Cyprus since 1974 constituted a continuing violation of Article 8 (*Cyprus v. Turkey*). The complete denial of this right had no basis in law within the meaning of Article 8(2) of the Convention. The inter-communal talks could not legitimize a Convention violation. The violation had endured as a matter of policy since 1974 and must be considered continuing (paras. 17-22).

(3) (by six votes to one, Judge Türmen dissenting) There had been, and continued to be, a violation of Article 1 of Protocol No 1. The applicant was denied access to and control, use and enjoyment of her property and any compensation for the interference with her property rights. The Court had found that Turkey did not lack jurisdiction and had responsibility for the acts complained of. Turkey continued to exercise overall military control over northern Cyprus. The continuing violation of the rights of displaced persons was not ended by the rejection of the Annan Plan. The applicant had still to be regarded as legal owner of her land. There was no reason to depart from conclusions reached in previous cases (paras. 24-32).

(4) (unanimously) It was unnecessary to examine the applicant's complaint under Article 14 of the Convention. From a different angle, the complaint had already been considered in relation to Article 8 of the Convention and Article 1 of Protocol No 1 and violations found (*Cyprus v. Turkey*) (paras. 33-6).

(5) (unanimously) Turkey had to introduce a remedy which secured the effective protection of the rights laid down in Article 8 of the Convention and Article 1 of Protocol No 1 for the applicant as well as in respect of all similar pending applications. The remedy was to be introduced within three months of the judgment date and redress afforded three months thereafter (paras. 37-40).

(6) (unanimously) With respect to any pecuniary or non-pecuniary damage, the application of Article 41 of the Convention¹² was reserved. The applicant was awarded EUR 65,000 for costs and expenses (paras. 41-59).

Dissenting Opinion of Judge Türmen: There had been no violation of Article 8 of the Convention and Article 1 of Protocol No 1 for the reasons given in the dissenting opinions in *Loizidou v. Turkey* (108 ILR 443 at 448-9).

Following this judgment, the TRNC authorities enacted a new compensation law, the Law for the Compensation, Exchange and Restitution of Immovable Properties ("Law No 67/2005"), which entered into force on 22 December 2005, and the By-Law made under sections 8(2)(A) and

¹² Article 41 of the Convention provided that: "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."

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22 of Law No 67/2005 which are within the scope of Article 159(1)(b) of the Constitution (“Law No 67/2005”), which entered into force on 20 March 2006. The Immovable Property Commission (“IPC”) was established under Law No 67/2005 to examine applications made in respect of properties within the scope of the law. It had five to seven members, two of whom were foreign; decisions on the restitution, exchange of properties or payment of compensation were within its competence. There was a right of appeal to the TRNC High Administrative Court.

Judgment on Just Satisfaction (7 December 2006)

Held (unanimously):—Turkey was to pay the applicant comprehensive sums of EUR 800,000, 50,000 and 35,000 in respect of pecuniary and non-pecuniary damage, and costs and expenses respectively, to be converted into Cypriot pounds and payable within three months of the final judgment date with interest for late payment.

(1) The applicant was awarded EUR 800,000 in respect of pecuniary damage, on an equitable assessment and in accordance with the IPC’s proposal.

(a) Efforts by the Turkish Government to provide redress for violations of the applicant’s Convention rights as well as in respect of similar pending applications were welcomed. The new compensation and restitution mechanism, in principle, had taken care of the requirements of the admissibility decision and merits judgment (paras. 14-37).

(b) Since the parties had failed to reach agreement on just satisfaction, and the applicant could not be required to apply to the IPC to seek reparation, the Court was to determine her entitlement to compensation in respect of losses emanating from the denial of access and loss of control, use and enjoyment of her property between 22 January 1990, the date of Turkey’s acceptance of the Court’s compulsory jurisdiction, and the present (paras. 37-9).

(c) In assessing the pecuniary damage, account was taken of the parties’ estimates as well as the uncertainties inherent in quantifying the real losses incurred (paras. 40-2).

(2) The applicant was awarded EUR 50,000 in respect of non-pecuniary damage on an equitable assessment for the anguish and feelings of helplessness and frustration which she must have experienced over the years in not being able to use her property as she saw fit and to enjoy her home (paras. 43-7).

(3) The applicant was awarded EUR 35,000 in respect of costs and expenses. Reimbursement was for costs and expenses which were actually and necessarily incurred and reasonable as to quantum (paras. 48-54).

The decision and judgments are set out as follows:

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Dissenting Opinion of Judge Türmen	72
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The following is the text of the decision as to admissibility:

DECISION AS TO ADMISSIBILITY**THE FACTS**

The applicant, Mrs Myra Xenides-Arestis, is a Cypriot national of Greek-Cypriot origin, who was born in 1945 and lives in Nicosia. The applicant is represented by Mr A. Demetriades, a lawyer practising in Nicosia.

At the oral hearing of 2 September 2004, the applicant was represented by Mr A. Demetriades and Mr I. Brownlie, CBE, QC assisted by Mrs J. Loizidou.

The respondent Government were represented by Prof. Dr Z. Necatigil, Mr D. Bethlehem, QC, Ms P. Nevill, Prof. Dr R. Ergeç, Mr E. Apakan, Mr D. Polat, Mr M. Özmen, Mr M. Gülşen and Mr I. Kocayigit. A statement was read out by Mr D. Bethlehem on behalf of Prof. Sir Elihu Lauterpacht, CBE, QC, also representing the respondent Government, who was not present at the hearing.

The Cypriot Government, who had made use of their right to intervene under Article 36 of the Convention, were represented by their agent Mr S. Nikitas, Attorney-General of the Republic of Cyprus, Lord Lester of Herne Hill, QC, Mrs S. M. Joannides, Ms S. Fatima and Mrs M. A. Stavrinides.

The applicant was also present.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

The applicant claims to partly own property in the area of Ayios Memnon (Esperidon Street), in the fenced-up area of Famagusta, that she acquired by way of gift from her mother. In particular, she states that she owns half a share in a plot of land with buildings thereon, which consist of one shop, one flat and three houses. She maintains that one of the houses was her home where she lived with her husband and children whereas the rest of the property was used by members of the family and/or rented out to third parties. Furthermore, the applicant states that she partly owns a plot of land with an orchard (her share being equivalent to 5/48). The rest is owned by other members of her family.

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The applicant submits that in August 1974 she was forced with her family by the Turkish military forces to leave Famagusta and abandon their home, property and possessions. She states that since then she has been prevented from having access to, from using and enjoying her home and property, which are under the occupation and the control of the Turkish military forces. According to the applicant, only the Turkish military forces have access to the fenced-up area of Famagusta.

On 23 April 2003, new measures were adopted by the authorities of the “Turkish Republic of Northern Cyprus” (“TRNC”) regarding crossings from northern to southern Cyprus and vice versa through specified checkpoints. On 30 June 2003, the “Parliament of the TRNC” enacted the “Law on Compensation for Immovable Properties Located within the Boundaries of the Turkish Republic of Northern Cyprus” which entered into force on the same day (“Law No 49/2003”). On 30 July 2003, under Article 11 of this “Law”, an “Immovable Property Determination Evaluation and Compensation Commission” was established in the “TRNC”. The rules of the Commission were published in the “TRNC Official Gazette” on 15 August 2003 and the Commission was constituted by a decision of the “TRNC Council of Ministers” published in the afore-mentioned Gazette on 18 August 2003. On the basis of this decision the following commission members were appointed: Mr S Dalioglu as President, Mr K. Fuat as Deputy President, Mr Y. Boran, Mr G. Silman, Mr H. Giray, Mr N. Yazman and Mr T. Gazioğlu as members. By letter dated 16 June 2004, the Government informed the Court that the deadline for submitting applications to the above-mentioned Commission was extended for one more year (until 30 June 2005).

On 24 April 2004 two separate referendums were held simultaneously in Cyprus on the Foundation Agreement–Settlement Plan (“Annan Plan”) which had been finalised on 31 March 2004. Since the plan was approved in the Turkish-Cypriot referendum but not in the Greek-Cypriot referendum, the Foundation Agreement did not enter into force.

B. Relevant domestic law

1. “Constitution of the Turkish Republic of Northern Cyprus” of 7 May 1985

Article 159(1)(b) in so far as relevant provides as follows:

All immovable properties, buildings and installations which were found abandoned on 13 February 1975 when the Turkish Federated State of

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Cyprus was proclaimed or which were considered by law as abandoned or ownerless after the above-mentioned date, or which should have been in the possession or control of the public even though their ownership had not yet been determined . . . and . . . situated within the boundaries of the TRNC on 15 November 1983, shall be the property of the TRNC notwithstanding the fact that they are not so registered in the books of the Land Registry Office; and the Land Registry Office shall be amended accordingly.

Article 159(4) reads as follows:

In the event of any person coming forward and claiming legitimate rights in connection with the immovable properties included in subparagraphs (b) and (c) of paragraph (1) above [concerning, *inter alia*, all immovable properties, buildings and installations which were found abandoned on 13 February 1975], the necessary procedure and conditions to be complied with by such persons for proving their rights and the basis on which compensation shall be paid to them, shall be regulated by law.

2. “*Law as to Compensation for Immovable Properties Located within the Boundaries of the Turkish Republic of Northern Cyprus, which are within the Scope of Article 159, paragraph (4) of the Constitution*” (Law No 49/2003)

The Republican Assembly of the Turkish Republic of Northern Cyprus enacts as follows:

Short title

1. This Law may be cited as the Law as to Compensation for Immovable Properties Located within the Boundaries of the Turkish Republic of Northern Cyprus, which are within the Scope of Article 159, paragraph (4) of the Constitution.

Interpretation

2. In this Law unless the context otherwise requires,
“Ministry” means the Ministry Responsible for Housing Affairs.

“Entitled person” means a person who has a legal claim in respect of immovable property coming within the scope of Article 159, paragraph (4) of the Constitution.

“Commission” means a commission constituted under Article 11 of this Law.

“Legal right” means the right to immovable property which is within the scope of Article 159, paragraph (4) of the Constitution.

“Immovable property” means immovable property within the scope of Article 159, paragraph (4) of the Constitution.

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Purpose

3. The purpose of this Law is to regulate the necessary procedure and conditions to be complied with by persons to prove their legal rights which they claim in respect to immovable properties within the scope of Article 159, paragraph (4) of the Constitution of the Turkish Republic of Northern Cyprus as well as the basis on which compensation shall be paid to such persons.

Application

4. (1) Natural and legal persons who claim legal rights to immovable properties specified in this Law may bring a claim by way of an application, in person or through a legal representative, to the Immovable Property Determination, Evaluation and Compensation Commission constituted under the provisions of this Law, requesting compensation for such property. Such an application must be made within a period of one year from the entry into force of this Law. Applications made to the Commission shall be subject to the Rules made under the Civil Procedure Law and, notwithstanding any other provision to the contrary in any law or legislative instrument, only a fee of 100,000,000 TL (one hundred million Turkish Liras) shall be paid for each application.

(2) The entry and exit in and out of the Turkish Republic of Northern Cyprus of persons, their legal representatives and agents applying to the Commission with a claim in virtue of the application of this Law, as well as of any person to be heard on their behalf, shall be free.

Production of Documents to the Commission

5. For Commission procedures specified in this Law, original documents, or copies of documents certified by a certifying officer for purposes of control together with the original documents which the parties wish to submit may be produced or filed with the Commission by the parties.

Burden of Proof and Factors as Basis of Decision

6. In proceedings before the Commission the burden of proof shall rest with the applicant who must satisfy the Commission as to the following in order that a decision may be taken in his favour:

(1) The immovable property in respect of which legal rights are claimed is or can be no other than that claimed in the petition.

(2) The immovable property to which the applicant claims legal rights was registered in his name before 20 July 1974 and/or he is the legal heir of the person in whose name the immovable property was so registered.

(3) There are no entitled persons according to the Land Registry records other than those claiming legal rights under this Law.