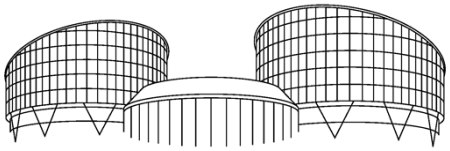

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF MİKAİL TÜZÜN v. TURKEY

(Application no. 42507/06)

JUDGMENT

STRASBOURG

27 November 2018

FINAL

27/02/2019

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Mikail Tüzün v. Turkey,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Robert Spano, *President,*
Paul Lemmens,
Ledi Bianku,
Işıl Karakaş,
Julia Laffranque,
Valeriu Griţco,
Jon Fridrik Kjølbro, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 6 November 2018,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 42507/06) 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 a Turkish national, Mr Mikail Tüzün ("the applicant"), on 17 October 2006.

2. The applicant was represented by Mr S.S. Acar and Mr S. Uz, lawyers practising in Istanbul. The Turkish Government ("the Government") were represented by their Agent.

3. The applicant complained that it had been impossible for him to modify the amount of his claim in the light of the compensation amount established in an expert report submitted to the administrative court. He also complained about the length of those proceedings.

4. In a decision of 8 April 2014, the Court declared the applicant's complaint regarding the length of proceedings inadmissible on account of a new remedy offered by Law no. 6384 and adjourned the examination of the remainder of the application.

5. On 26 June 2017 the Government were given notice of the applicant's remaining complaint.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1960 and lives in Istanbul.

7. On 11 December 1995 the applicant, a traffic control officer, was hit by a car while on duty. He suffered bodily injuries as a result of the accident. An official disability report indicated that he had a reduced working capacity of 60%.

8. On the basis of this report the applicant, while reserving the right to increase his claims in due course, made an initial request for compensation to the Ministry of Interior, claiming 20,000 Turkish liras (TRY) in pecuniary damages and TRY 5,000 in non-pecuniary damages.

9. Following tacit dismissal of the claim by the Ministry, the applicant brought a case for compensation before the Istanbul Administrative Court for the amounts he had specified in his request to the Ministry.

10. During the course of the proceedings, the court decided of its own motion to order an expert report to determine the exact amount of pecuniary damage suffered by the applicant. The report, which was submitted to the court on 26 September 2005, indicated the applicant's pecuniary damages as 157,077 TRY. The applicant did not submit a request to the court to increase his initial claims in the light of that report. The Istanbul Administrative Court in its decision delivered on 15 February 2006 only awarded him the amounts initially requested by him.

II. RELEVANT DOMESTIC LAW AND PRACTICE

11. At the time of the events, Turkish administrative law did not allow claimants to amend their initial claims during the course of proceedings before the administrative courts (see, in particular, *Okçu v. Turkey*, no. 39515/03, §§ 27-32, 21 July 2009).

12. Since 30 April 2013, as a result of an amendment to the Code of Administrative Procedure, parties in full remedy actions have been able to revise their initial claims, provided that the related costs are paid.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

13. The applicant complained of the absence of a remedy that would have allowed him to claim the entire compensation amount determined by the expert during the course of the domestic proceedings. The Court considers that the complaint concerns the applicant's right of access to a court guaranteed by Article 6 § 1 of the Convention, the relevant parts of which provide as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

14. The Government contested the applicant's arguments.

A. Admissibility

15. The Government invited the Court to reject the application for non-exhaustion of domestic remedies. They submitted that the applicant had neither explicitly reserved his right to increase his initial claim in the course of the proceedings when he had lodged his claim with the Istanbul Administrative Court nor subsequently requested that the court give a decision concerning the additional amount as set out in the expert report in question.

16. The applicant argued that the relevant domestic law at the material time had precluded him from amending his claim or bringing an additional administrative action before the courts on the basis of an expert report provided in the proceedings.

17. The Court reiterates that in the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see, among other authorities, *Akdivar and Others v. Turkey*, 16 September 1996, § 68, *Reports of Judgments and Decisions* 1996-IV). In that connection, the Court refers to its finding made in the context of a complaint under Article 13 of the Convention, that in the context of Turkish administrative law as in force at the material time there were no domestic remedies whereby claimants could increase the initial amount of their claims in the course of the proceedings (see *Okçu v. Turkey,* no 39515/03*,* §§ 27-32 and 64, 21 July 2009). The Court sees no reason to depart from that finding in the present case and therefore considers that the applicant's complaint cannot be rejected for failure to exhaust domestic remedies.

18. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

19. The applicant maintained his arguments.

20. The Government left it to the Court's discretion to assess the merits of the applicant's complaint and submitted that the legislation in question, which had prevented claimants from modifying their initial claims before

the administrative courts, had been amended on 30 April 2013 (see paragraph 12 above).

21. While the Court welcomes the amendments to the relevant domestic law, it notes that the previous legislation and practice was applicable to the applicant's case. The amendments do not therefore affect the applicant's situation.

22. As regards the merits, the Court notes that it is not disputed between the parties that the true extent of the applicant's pecuniary damage was only brought to light during the course of the proceedings by an expert report which was ordered by the relevant court of its own motion. It is also not disputed that the only reason why the applicant was unable to increase his initial claim in the light of the expert report in question was the statutory obstacle in administrative court procedure.

23. In the case of *Fatma Nur Erten and Adnan Erten v. Turkey* (no. 14674/11, §§ 29-33, 25 November 2014), the Court found a violation of Article 6 § 1 of the Convention in respect of a similar set of circumstances relating to the same procedural restriction in the Code of Supreme Military Administrative Court (Law no. 1602). Having noted that the only reason why claimants could not modify their claims was because of the strict application of the procedural rule, the Court took the view that it would be unreasonable to expect the applicant to have known the exact extent of his pecuniary damage at the time of lodging his case with the military administrative court or to require him to overestimate his claim deliberately and lodge a case for a higher amount by paying higher court fees which would result in a disproportionate limitation on the right of access to court (see, as a recent example, *Tamer Tanrıkulu v. Turkey,* no. 36488/08, 29 November 2016).

24. The Court finds that the same considerations are applicable to the instant case and sees no reason to hold otherwise.

There has accordingly been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

25. Article 41 of the Convention provides:

> "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."

26. The applicant claimed TRY 906,848 (approximately 188,573 euros (EUR)) in respect of pecuniary damage and TRY 235,000 (approximately EUR 48,860) in respect of non-pecuniary damage. He further claimed TRY 243,542 (approximately EUR 50,640) for legal fees, but did not submit an invoice or any other documents in support of that claim.

27. The Government submitted that the applicant's just satisfaction claims and claims for legal fees were excessive and unfounded.

28. As regards pecuniary damage, the Court notes that it cannot speculate as to what the outcome of proceedings compatible with Article 6 § 1 would have been.

29. The Court reiterates that the most appropriate form of redress for a violation of Article 6 § 1 would be to ensure that the applicant, as far as possible, is put in the position in which he would have been had this provision not been disregarded (see, for example, *Mehmet and Suna Yiğit v. Turkey*, no. 52658/99, § 47, 17 July 2007). The Court finds that this principle applies in the present case as well. Consequently, it considers that the most appropriate form of redress would be the reopening of the proceedings, to be held in accordance with the requirements of Article 6 § 1 of the Convention, should the applicant so request. On the other hand, the Court considers that the applicant must have suffered distress and frustration in view of the violation found. It therefore awards him EUR 2,500 on account of non-pecuniary damage.

30. As regards costs and expenses the Court reiterates that, according to its case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see, among other authorities, *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 187, 29 November 2016). In the present case, the applicant has not substantiated his claim for costs and expenses. Accordingly, the Court makes no award under this head.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate

equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 27 November 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Registrar	Robert Spano President